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No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1957

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, PETITIONER

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF AGRICULTURE

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BRIEF FOR THE SECRETARY OF AGRICULTURE

PRIOR OPINIONS

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 77–84) is reported in 241 F. 2d 192. The decision of the Judicial Officer[1] in

[1] The Judicial Officer acted for the Secretary of Agriculture pursuant to authority delegated to the Judicial Officer. 10 F. R. 13769; 11 F. R. 177A–233; 18 F. R. 3219, 3648; 19 F. R. 74. The delegation was originally authorized by Congress (Act of April 4, 1940, 54 Stat. 81, 5 U. S. C. 1952 ed. § 516a *et seq.*) as a result of *Morgan* v. *United States*, 298 U. S. 468, and *Morgan* v. *United States*, 304 U. S. 1, and is in accordance with the recommendation of the Attorney General's Committee on Administrative Procedure in Government Agencies (S. Doc. No. 8, 77th Cong., 1st sess., p. 53).

the United States Department of Agriculture (R. 6–33) is reported in 15 Agr. Dec. 638.

JURISDICTION

The judgment of the Court of Appeals (R. 84) was entered on February 15, 1957. The petition for a writ of certiorari was filed on May 8, 1957, and was granted on June 3, 1957 (R. 88). The jurisdiction of this Court is invoked under 5 U. S. C. 1952 ed. § 1040 and 28 U. S. C. 1952 ed. § 1254 (1). It is provided, *inter alia,* in 5 U. S. C. 1952 ed. § 1040, that "[e]ither the United States or the agency or an aggrieved party may file such petition for a writ of certiorari." The Secretary of Agriculture is authorized to participate "as of right" in the litigation and be independently represented by counsel. 5 U. S. C. 1952 ed. § 1038.

THE STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS

The petition for judicial review of the administrative decision by the Judicial Officer in the United States Department of Agriculture is based on the so-called Hobbs Act (64 Stat. 1129, 5 U. S. C. 1952 ed. § 1031 *et seq.*), and the administrative decision thus subjected to judicial review is based on the Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U. S. C. 1952 ed. § 181 *et seq.*).

A. THE PACKERS AND STOCKYARDS ACT

The Packers and Stockyards Act regulates, *inter alia,* the marketing of livestock at those stockyards which are "posted" by the Secretary of Agriculture,

i. e., determined by the Secretary to be within the statutory definition of a "stockyard" in 7 U. S. C. 1952 ed. § 202 (a). The Act prohibits a market agency or dealer from engaging in business at a posted stockyard unless the market agency or dealer is registered with the Secretary. 7 U. S. C. 1952 ed. § 203.

A "market agency" is defined in the Act as "any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services." 7 U. S. C. 1952 ed. § 201 (c). The statutory term "stockyard services" is defined as "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." 7 U. S. C. 1952 ed. § 201 (b). The term "dealer" is defined in the Act as "any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser." 7 U. S. C. 1952 ed. § 201 (d). The term "stockyard owner" as defined in the Act means "any person engaged in the business of conducting or operating a stockyard." 7 U. S. C. 1952 ed. § 201 (a).

It is "the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard * * *." 7 U. S. C. 1952 ed. § 205. It is also "the duty of every stockyard owner and

market agency to establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U. S. C. 1952 ed. § 208.

Whenever, after a "full hearing upon a complaint * * * the Secretary is of the opinion that any * * * regulation * * * of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory," the Secretary may "determine and prescribe * * * what regulation * * * is or will be just, reasonable, and non-discriminatory to be thereafter followed" and may, by order, require the stockyard owner or market agency to "conform to and observe the regulation or practice so prescribed." 7 U. S. C. 1952 ed. § 211.

The Secretary is authorized to issue "such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter * * *." 7 U. S. C. 1952 ed. § 228.

The relevant provisions in the Act are set forth in the Appendix, *infra,* pp. 86–97.

B. THE ADMINISTRATIVE REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

The regulations issued by the Secretary relate, *inter alia,* to the posting of stockyards, the registration of market agencies and dealers, and the facilities and services at posted stockyards. 9 CFR, 1956 Supp., § 201.1 *et seq.* The rules of practice issued by the Sec-

retary relate, *inter alia,* to disciplinary and other adjudicatory proceedings. 9 CFR § 202.5 *et seq.*

It is provided in the rules of practice, under the Packers and Stockyards Act, that a formal complaint may be filed by an interested person and "if the Administrator should so determine, a proceeding filed pursuant to section 304 of the Act [*i. e.,* 7 U. S. C. 1952 ed. § 205] or a proceeding involving the application of a regulation established or filed pursuant to section 307 of the Act [*i. e.,* 7 U. S. C. 1952 ed. § 208] may be instituted upon the moving paper filed by the person who filed the informal complaint." 9 CFR § 202.6 (b).

C. THE PROVISIONS IN THE HOBBS ACT

"[A]ll final orders" of the Secretary of Agriculture "made under the Packers and Stockyards Act, 1921, as amended, * * * except orders issued under sections 210 (e), [and] 217a * * *" are subject to judicial review under the so-called Hobbs Act. Act of December 29, 1950, 64 Stat. 1130, 5 U. S. C. 1952 ed. § 1032. The exceptions relate only to final orders awarding damages (7 U. S. C. 1952 ed. § 210 (e)) and to final orders relating to brand inspection (7 U. S. C. 1952 ed. § 217a). This Act supersedes the review procedure formerly applicable under the Urgent Deficiencies Act of 1913, as amended (Act of October 22, 1913, 38 Stat. 220; 28 U. S. C. 1952 ed. §§ 2321–2325) with respect to orders of the Interstate Commerce Commission and made applicable to orders under the Packers and Stockyards Act by § 316 of the Packers and Stockyards Act (7 U. S. C. 1952 ed. § 217). Section 316 of the Packers and Stockyards Act (7 U. S. C. 1952 ed.

§ 217) has been repealed only to the extent that it is inconsistent with the Hobbs Act. Act of December 29, 1950, § 13, 64 Stat. 1132.

Jurisdiction is vested in the Court of Appeals by the terms of the Hobbs Act (5 U. S. C. 1952 ed. § 1032), and in the Supreme Court on a petition for certiorari (5 U. S. C. 1952 ed. § 1040). The record on which the administrative order is based is certified, by the Secretary, to the Court of Appeals for the purpose of judicial review. 5 U. S. C. 1952 ed. § 1036. The Secretary of Agriculture may participate "as of right," on judicial review, and be independently represented by counsel. 5 U. S. C. 1952 ed. § 1038. "Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari." 5 U. S. C. 1952 ed. § 1040.

QUESTIONS PRESENTED

The regulations, issued by the owner of the terminal stockyards in Denver, relate to the furnishing of stockyard services at that market. The regulations were challenged in the administrative proceeding by a market agency, but no evidence was adduced as to whether the regulations are unreasonable. The market agency, as the complainant in the administrative proceeding, elected to present no evidence and to submit its case on the proposition that the regulations are, as a matter of law, illegal on their face. A stockyard owner and market agency are obligated—under the Packers and Stockyards Act—"upon reasonable request" to furnish "reasonable stockyard services" at a stockyard which is regulated under the Packers and

Stockyards Act, and a stockyard owner and market agency are also required by the Act to establish, observe, and enforce reasonable and non-discriminatory regulations with regard to the furnishing of "reasonable stockyard services." The questions presented are:

(1) Whether the regulations are, as a matter of law, illegal on their face because in a certain hypothetical situation referred to by the Court of Appeals the regulations would seem to be unreasonable.

(2) Whether the regulations are, as a matter of law, illegal in their entirety because as held by the Court of Appeals in a certain hypothetical situation a significant part of the regulations would be unreasonable.

(3) Whether in the total absence of any evidence to show that the regulations are unreasonable the regulations are, as a matter of law, unreasonable and the administrative agency is required, as a matter of law, to issue a cease and desist order with respect to the regulations.

STATEMENT

A. THE ADMINISTRATIVE PROCEEDING AND DECISION

The complaint was filed with the Secretary of Agriculture by the Producers Livestock Marketing Association, a market agency at the Denver Union stockyard, and it is alleged in the complaint that certain regulations issued by the Denver Union Stock Yard Company are invalid under the Packers and Stockyards Act (R. 39–42). The prayer in the complaint is that the regulations be set aside and annulled (R. 42). The contested regulations issued by the stockyard owner provide that (R. 12, 39–40, 44):

(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows:

The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

The provisions of paragraph (c) do not

apply on livestock solely used for breeding purposes.

It was administratively determined, under the procedural regulations (9 CFR § 202.6 (b)), that the "complaint should be entertained as the moving paper initiating a proceeding [by the Producers Livestock Marketing Association, as the complainant, against the Denver Union Stock Yard Company, as the respondent in the administrative proceeding] under the rules applicable to disciplinary proceedings * * *" pursuant to the Packers and Stockyards Act (R. 61).

In the answer filed, in the administrative proceeding, by the Denver Union Stock Yard Company it is admitted that the Company issued the regulations (R. 44), and it is alleged, *inter alia,* that the regulations are necessary to enable the stockyard owner "to furnish, upon reasonable request, without discrimination, reasonable stockyard services * * * and to enable the patrons of the Denver Union stockyards to secure, upon reasonable request, without discrimination, reasonable stockyard services * * *" (R. 46). It is also alleged in the answer that the practices of the Producers Livestock Marketing Association and some others are contrary to the duties and responsibilities of such registrants at this market and that the regulations are necessary in order to effectuate just, reasonable, and non-discriminatory practices at the Denver market (R. 44–47). The prayer in the answer is that the Stock Yard Company "be granted an oral hearing * * * and that the complaint be dismissed" (R. 47–48).

The Denver Union Stock Yard Company, the re-

spondent in the administrative proceeding, filed a motion—in preparation for the administrative hearing—to require the Producers Livestock Marketing Association to produce, for examination and copying, certain books and records identified in the motion and alleged to be relevant and necessary in order to show that the contested regulations are reasonable and relate only to the performance of reasonable stockyard services (R. 48–51).

In opposing the motion by the Stock Yard Company for the production of certain books and records of the complainant, the Producers Livestock Marketing Association filed an election "to stand upon the illegality of said regulation[s], as a matter of law," and contended that the regulations are illegal and invalid upon their face (R. 72). It was stated by the Producers Livestock Marketing Association, in its "Election to Rest," that "it will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation[s] as a matter of law," and it was stated that the complainant "hereby rests and submits its case for final decision by the Secretary of Agriculture" (R. 72).

The Hearing Examiner was of the opinion that the proceeding, in these circumstances, should be "certified to the Judicial Officer for decision, with a recommendation that it be dismissed" (R. 73). The Judicial Officer concluded that upon the limited record before him he could not find that the contested regulations of the Denver Union Stock Yard Company, the respondent in the administrative proceed-

ing, are invalid upon their face, and, accordingly, he dismissed the complaint (R. 6, 33). It was made plain in the decision by the Judicial Officer that the issue for decision is not the broad question as to whether the regulations are under the relevant facts and circumstances valid or invalid, but only the narrow question as to whether the regulations are as a matter of law invalid on their face (R. 16).

B. THE PROCEEDING AND DECISION IN THE COURT OF APPEALS

The Producers Livestock Marketing Association filed a petition in the Court of Appeals to review the decision of the Judicial Officer (R. 1–5). The United States and the Secretary of Agriculture were designated as the respondents in the Court of Appeals (R. 1–5) and the Denver Union Stock Yard Company intervened as a respondent in the Court of Appeals (R. 33–34).

The Court of Appeals concluded that the regulations are violative of the statutory requirement that a stockyard owner or market agency shall, upon reasonable request, furnish reasonable stockyard services at a posted stockyard (R. 77–84). "The compulsion of the regulation," said the Court of Appeals, "is in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act] which contemplates and imposes the duty upon marketing agencies to render reasonable services to its [*sic*] customers at *every* stockyard where they do business. If by rendering reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from ren-

dering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another" (R. 82). "Although it may be argued," said the Court of Appeals, "that attempts, successful or otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties [*i. e.*, the market agency and the stockyard owner] and thereby lower the ability of both to render efficient service [*i. e.*, reasonable stockyard services], still such argument, even if proved to be soundly based in fact, has no legal significance" (R. 82).

The Court of Appeals was of the opinion that the regulations are an unlawful restriction upon "the statutory rights and duties of petitioners and all market agencies" and bear "no reasonable relationship to the duties required of the stockyard company under the provision of the Packers and Stockyards Act" and are invalid (R. 83–84). The Court of Appeals remanded the proceeding to the Secretary of Agriculture with directions to issue a cease and desist order against the issuance or enforcement of the regulations by the stockyard owner (R. 84).

SUMMARY OF ARGUMENT

The issues relate to certain regulations issued by the Denver Union Stock Yard Company pursuant to the Packers and Stockyards Act (7 U. S. C. 1952 ed. § 181 *et seq.*). The contested regulations provide that "[n]o market agency or dealer engaging in business at this Stock Yard shall, upon Stock Yard Company prop-

erty, or elsewhere, nor shall any other person upon Stock Yard Company property * * * [s]olicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere" or divert livestock from this market which would otherwise normally come to this market or interfere with the normal flow of livestock to this market (R. 12, 39). The "normal marketing area", as to which the regulations are applicable, is defined in the regulations as being the State of Colorado with certain counties or areas therein excepted (R. 12, 39).

No evidence was received in the administrative proceeding. The complaint was filed by the Producers Livestock Marketing Association, a market agency at the Denver stockyards, and as the complainant in the administrative proceeding it elected to stand upon the illegality of the regulations "as a matter of law," and contended that the regulations are invalid on their face (R. 72). It was stated by the complainant in the administrative proceeding that it would not present evidence in the proceeding and it submitted "its case for final decision by the Secretary of Agriculture" (R. 72). The "Election to Rest," filed by the complainant in the administrative proceeding, was subsequent to the filing of a motion by the Denver Union Stock Yard Company—the respondent in the administrative proceeding—to require the complainant to produce, for examination and copying, certain books and records identified in the motion and alleged to be relevant and necessary in order to enable the Stock Yard Company to show, at the hearing, that the contested

regulations are reasonable and relate only to the performance of reasonable stockyard services (R. 48–51).

I

A. The regulations relate to the furnishing of stockyard services and are not, as a matter of law, unreasonable so as to be violative of the statutory requirement for the furnishing of "reasonable stockyard services" (7 U. S. C. 1952 ed. §§ 205 and 208). It is the "duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services * * *." 7 U. S. C. 1952 ed. § 205. Although the term "stockyard services" is defined in the Act, there is, however, no statutory definement of the word "reasonable" as used in the term "reasonable stockyard services." The statute merely provides that the term "stockyard services" means "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." 7 U. S. C. 1952 ed. § 201 (b).

Inasmuch as the duty to furnish "reasonable stockyard services" is described in general terms, without more, the duty is imposed on a stockyard owner to "establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services." 7 U. S. C. 1952 ed. § 208. Pursuant to that requirement of the Act the Denver Union Stock Yard Company, as the owner of the stockyard, issued the regulations which are contested by a market agency, the respondent in this Court.

B. The business activities which are referred to in the term "reasonable stockyard services" are of such broad and variable character that the statutory term is manifestly without rigid and fixed meaning as a matter of law. The stockyard services will necessarily vary from market to market, depending on the local circumstances. There are 571 stockyards posted for regulation under the Act, and some of the stockyards are great terminal markets and some are relatively small auction markets. The stockyard services will necessarily vary depending on whether it is cattle or sheep or swine or horses or mules or goats that are being marketed—the term "livestock" as used in the Act means "cattle, sheep, swine, horses, mules, or goats * * *" (7 U. S. C. 1952 ed. § 182 (4)). The stockyard services will vary from market to market, and in addition there are variables in each market, *e. g.*, abnormal weather conditions (*Illinois Packing Co.* v. *Union Stock Yard & Transit Company*, 15 Agr. Dec. 1101, 1106–1110 and 16 Agr. Dec. 305, 306–309; *Flynn* v. *Kansas City Stock Yards Co.*, 12 Agr. Dec. 14, 24–25).

There can be no doubt that the stockyard services to be furnished with respect to the "receiving" of livestock, the "feeding" of livestock, the "watering" of livestock, the "holding" of livestock, the "delivery" of livestock, and the "handling" of livestock are not to be interpreted, as a matter of law, in an abstract, sterile way but in view of the facts in a particular case. Similarly, the services to be furnished by a stockyard owner or market agency with respect to the "buying" of livestock, the "selling"—

on a commission basis or otherwise—of livestock, and the "marketing" of livestock also have their rootage in the facts. For example, the buying, selling, and marketing of livestock at a terminal market are significantly different, in various respects, from the buying, selling, and marketing of livestock at auction markets. In addition, the methods of sale at the auction markets are not uniform.

The stockyard services to be furnished in a particular market are different from the requisite services 36 years ago at the time of the enactment of this statute. New developments in transportation and communication since 1921 have had a pronounced impact on our marketing system. The terms of the statute call for a continuous process of application, and the application of the term "reasonable stockyard services" with respect to the selling, buying, and marketing of livestock at a posted market, under this Act, cannot be determined by mere verbality as a matter of law.

The structure and purpose of the Act show that the application of the term "reasonable stockyard services" is dependent on the relevant factual circumstances. The broad scope of the regulations by a stockyard owner is underscored by the reference in the Act to regulations by a stockyard owner which are "for or in connection with" the furnishing of reasonable stockyard services. 7 U. S. C. 1952 ed. § 211. The business practices which are "in connection with" the furnishing of services at a stockyard are not further described or identified in the Act and are to be

determined in view of their relevance and significance in the current of livestock marketing.

The owner of a stockyard is allowed—within the zone of reasonableness—to have supervision over the services and facilities in the owner's business. The Secretary is authorized, however, to prescribe regulations which must be observed if he decides "after full hearing" that "any * * * regulation or practice of a stockyard owner or market agency * * * is or will be unjust, unreasonable, or discriminatory * * *." 7 U. S. C. 1952 ed. § 211.

The long established administrative practice under the Act supports the view that the relevant facts—in the business areas involved—must be considered and evaluated in determining whether the regulations in this case are "unreasonable" so as to be violative of the statutory provisions. Many regulations—which have been made effective since the statute was enacted in 1921—reveal the efforts by the industry and by the Secretary to apply the statutory terms to the complexities in this great current of business. Numerous regulations have been made effective with respect to the solicitation of business by market agencies or dealers. Various terminal stockyards have regulations which are similar to the contested rules of the Denver Union Stock Yard Company. Many terminal stockyards have regulations in effect to prohibit market agencies and dealers from engaging in various business activities in certain areas of the stockyards or in certain areas adjacent to the stockyards. Many terminal stockyards provide that stock-

yard services will be furnished only to a "reasonable number" of market agencies and dealers, and it is the general practice to deny stockyard services to a market agency or dealer who engages in unfair, dishonest, or fraudulent practice or who destroys stockyard property or who engages in other proscribed activities. The regulations issued by the Secretary also manifest the administrative practice of interpreting the terms of the Act on the basis of the factual circumstances in each market. See *e. g.*, 9 CFR, 1956 Supp., § 201.79 (b), 9 CFR (1st ed. 1939) §§ 201.16–201.17 and 1956 Supp., §§ 201.71–201.85. The adjudicatory decisions by the Judicial Officer also reveal that the statutory terms are general standards which, in order to have practicality, must be applied on the basis of the different and changing circumstances in a huge and complex industry.

C. The Court of Appeals disposed of the case on the basis of the Court's assumptions of fact, *viz.*, (1) that a market agency at Denver is also a registrant at another posted stockyard which is competitive with the one in Denver, and (2) that "by rendering a reasonable service for a Colorado customer at one stockyard" it is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard (R. 82). The Court of Appeals concluded that the "compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act, 7 U. S. C. 1952 ed. § 205] which contemplates and imposes the duty upon marketing agencies to render reasonable services to its [*sic*] customers at *every*

stockyard where they do business" (R. 82). The decisiveness of that holding by the Court of Appeals is revealed by its explanation that "[a]lthough it may be argued that attempts, successful or otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties [*i. e.*, the market agency and the stockyard owner] and thereby lower the ability of both to render efficient service [*i. e.*, reasonable stockyard services], still such argument, even if proved to be soundly based in fact, has no legal significance" (R. 82).

The Court's opinion is based only on the supposal set forth in its opinion. There is nothing in the record to support the Court's hypothesis. It would of course require an inquiry into the facts to determine whether, in the Court's hypothesis, the hypothetical market agency was "rendering a *reasonable* [emphasis supplied] service for a Colorado customer at one stockyard" in the situation which was undisclosed in the Court's assumption of facts, and it would also require an inquiry into the facts to determine whether the particular market agency would be prohibited by the regulations "from rendering *reasonable* service for the *same or a different* [emphasis supplied] Colorado customer at another stockyard" in whatever the factual situation is to which the Court alludes (R. 82).

The holding by the Court of Appeals is squarely in conflict with *Associated Press* v. *Labor Board*, 301 U. S. 103, 132, in which it was held that courts in passing on the validity of a regulation, under an Act of Congress, are to dispose of the case "upon the

basis of the facts disclosed," never on the basis of "nonexistent and assumed circumstances." It is not for the Secretary or the courts to determine what the terms of the Act may require upon supposable facts, but to adjudge the issues upon existing facts.

The principle which was applied in *Associated Press* v. *Labor Board, supra,* is particularly forceful with respect to statutory terms of generality and adaptability such as those in the case at bar. To interpolate into the statutory provisions in the Packers and Stockyards Act a provision that the regulations must be reasonable as applied to artificial, hypothetical, or assumed circumstances would so obviously effectuate the enfeeblement and devitalization of the Act that it cannot be accepted as a proper interpretation of the purpose of Congress.

The regulations apply to dealers as well as to market agencies, but the Court of Appeals nullified the regulations *in toto* even though the assumed case, in the Court's opinion, relates only to a market agency and the statutory provision relied on by the Court refers only to stockyard owners and market agencies. Assuming, *arguendo,* that the regulations are invalid as to market agencies, nonetheless the regulations should not have been declared invalid as to dealers also, and the Court should have remanded the case to the Secretary for further proceedings in accordance with the Act and the Court's opinion. *Federal Power Com.* v. *Idaho Power Co.,* 344 U. S. 17, 20; *Federal Comm'n* v. *Broadcasting Co.,* 309 U. S. 134, 141–146. If the regulatory provisions are, in whole or in part, unreasonable the Secretary may, under

the Act, determine and prescribe what regulations are or will be reasonable to be thereafter followed and observed by market agencies or stockyard owners. 7 U. S. C. 1952 ed. § 211.

The reasonableness of rates and regulations, under the Act, depends on the evidence. In the total absence of any evidence to show that the regulations are unreasonable, the Court of Appeals erred in holding that the regulations are, as a matter of law, unreasonable and in requiring the administrative agency to issue a cease and desist order with respect to the regulations.

On the reversal of the judgment of the Court of Appeals and the affirmance of the decision of the Judicial Officer, the administrative agency will be free to take whatever action, if any, is appropriate with respect to the contested regulations. The Secretary may on his own motion institute an investigation or a hearing as to the validity of the regulations. 7 U. S. C. 1952 ed. §§ 210 (e) and 222. The Secretary has full authority to take such further action as, in his discretion, is appropriate.

II

This proceeding is based on the Packers and Stockyards Act, and the validity of the regulations must be determined by the provisions of this statute. The Packers and Stockyards Act is an integrated and inclusive statute fully dealing with all aspects of the stockyard industry. See H. Rept. No. 77, 67th Cong., 1st sess., p. 2. Specifically, the Act provides for complete regulation with respect to the rates charged

by a stockyard owner. 7 U. S. C. 1952 ed. §§ 206, 207, 209, 210, 211, 212. In view of the comprehensive plan, in the Packers and Stockyards Act, for the regulation of the stockyard industry, including regulation "with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed" (*McLean Trucking Co.* v. *United States,* 321 U. S. 67, 85), the regulations in this case must be tested by the standards of the Packers and Stockyards Act, and the Act should be construed "in the light of the special considerations that have influenced Congress to make specific provision for the particular industry." *Federal Communications Commission* v. *RCA Communications, Inc.,* 346 U. S. 86, 98.

The Judicial Officer properly concluded that he was unable to determine whether the regulations are invalid inasmuch as the record is lacking "in such information as the quantity, type, and nature of the livestock business conducted in the prescribed area, the competing elements of the livestock industry in such area, the possible effect of respondent's regulation upon the competitive marketing organizations in the area in question, the general flow of livestock originating in the defined area, and other relevant matter" (R. 30).

Issues such as those in this case must be determined upon the basis of the relevant facts. For example, in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238, the Court held that to determine whether a rule prohibiting members of the Chicago Board of Trade from engaging in certain types of purchases

at a price other than the closing bid on the Exchange required a consideration of the "facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." Questions of reasonableness "are necessarily questions of relation and degree" and, therefore, "each case demands a close scrutiny of its own facts." *Sugar Institute* v. *United States,* 297 U. S. 553, 600. See, also, *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344. There are no facts in this record which afford a basis for a conclusive presumption or even an inference that the regulations are illegal. The validity of the regulations can be determined only on the basis of evidence, and the record here fails to afford that basis.

ARGUMENT

I. THE REGULATIONS RELATE TO THE FURNISHING OF STOCKYARD SERVICES AND ARE NOT, AS A MATTER OF LAW, UNREASONABLE SO AS TO BE VIOLATIVE OF THE STATUTORY REQUIREMENT FOR THE FURNISHING OF "REASONABLE STOCKYARD SERVICES"

A stockyard owner is required by the Packers and Stockyards Act to issue regulations and establish practices with respect to the furnishing of stockyard services. The issues in the case converge on the words of the Act.

A. A STOCKYARD OWNER IS REQUIRED BY THE PACKERS AND STOCKYARDS ACT TO ISSUE, OBSERVE, AND ENFORCE REGULATIONS WITH REGARD TO THE FURNISHING OF "REASONABLE STOCKYARD SERVICES" UPON "REASONABLE REQUEST"

The statutory requirement for the furnishing of "reasonable stockyard services" by stockyard owners

and market agencies is a pivotal provision in the Packers and Stockyards Act. 7 U. S. C. 1952 ed. §§ 205 and 208. The "dominant purpose" of the Act is "to secure to patrons of the stockyards *prescribed stockyard services* at just and reasonable rates" (emphasis supplied). *United States* v. *Morgan,* 307 U. S. 183, 188–189. "[A]ll *practices* in connection with the livestock passing through the yards shall be just, reasonable, non-discriminatory and non-deceptive" (emphasis supplied). *Stafford* v. *Wallace,* 258 U. S. 495, 513–514.

Specifically, it is the "duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services * * *." 7 U. S. C. 1952 ed. § 205. Although the term "stockyard services" is defined in the Act, there is, however, no statutory definement of the word "reasonable" as used in the term "reasonable stockyard services." The statute merely provides that the term "stockyard services" means "services or facilities furnished at a [posted] stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." 7 U. S. C. 1952 ed. § 201 (b).

Inasmuch as the duty to furnish "stockyard services" is not absolute or unqualified but is limited to the furnishing of "reasonable stockyard services" upon "reasonable request" and, also, the services

thus referred to are described in general terms, without more, the additamentary duty is imposed on a stockyard owner to "establish, observe, and enforce just, reasonable, and non-discriminatory regulations and practices in respect to the furnishing of stockyard services" at a posted market[2] (7 U. S. C. 1952 ed. § 208). Pursuant to that requirement of the Act, the Denver Union Stock Yard Company, as the owner of the posted stockyard in Denver,[3] issued the regulations which are contested by a market agency,[4] the respondent in this Court.

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[2] The cardinal purpose, in this respect, is that "reasonable stockyard services" shall be furnished on "reasonable request." The statutory reference in 7 U. S. C. 1952 ed. §§ 205 and 208 to the furnishing of stockyard services without discrimination plainly means that the services are to be furnished without unreasonable or unjust discrimination. The word "discrimination" without a qualifying adjective such as "unjust" means unjustly, unreasonably, or unduly discriminatory. *United States* v. *Wells-Fargo Express Co.*, 161 Fed. 606, 610 (C. A. 7), affirmed, *sub nom. American Express Co.* v. *United States*, 212 U. S. 522. See, also, *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 521.

[3] The Denver Union Stock Yard Company "is a corporation that owns and operates the Denver Union Stockyards * * *," a stockyard posted under the Packers and Stockyards Act (R. 11). The Denver stockyard has been a "posted market" since November 1, 1921, under the Packers and Stockyards Act. 9 CFR (1st ed. 1939) § 204.1. See, also, *In re Denver Union Stock Yard Company*, 10 Agr. Dec. 1033.

[4] The Producers Livestock Marketing Association, the respondent in this Court, is registered with the Secretary "as a market agency to buy and sell livestock on a commission basis at the Denver Union Stockyards, Denver, Colorado, a stockyard posted" under the Packers and Stockyards Act (R. 11).

B. THE STATUTORY CRITERIA ARE TERMS OF GENERAL IMPORT TO BE APPLIED TO DIVERSIFIED FACTUAL SITUATIONS

1. *The business activities which are referred to in the term "stockyard services" are of such broad and variable character that the statutory term "reasonable stockyard services" is manifestly without rigid and fixed meaning as a matter of law*

The significant words of the Act are variables affected by facts and circumstances. To be sure, it is the duty of a stockyard owner or market agency to furnish "reasonable stockyard services" but the "services" or "facilities" which must be furnished, within the zone of reasonableness, are not self-defining terms. The Congress could not foresee every contingency in the marketing of livestock at the many stockyards throughout the Nation; and in prescribing the stockyard services to be furnished by a stockyard owner or a market agency the significant terms of the Act are of general import.

The definition of "stockyard services" refers at the outset to "services or facilities furnished at a stockyard * * *." 7 U. S. C. 1952 ed. § 201 (b). But the words "services or facilities" are without definition. It has been held that a "service," under the Packers and Stockyards Act, is any result of useful labor which does not produce a tangible commodity. *State of Colorado* v. *United States,* 219 F. 2d 474, 476 (C. A. 10). "[T]he word 'facilities'", as used in a regulatory measure, "is generally regarded as a widely inclusive term, embracing anything which aids or makes easier the performance of the activities involved in the business of a person

* * *." *Hartford Electric Light Co.* v. *Federal Power Com.*, 131 F. 2d 953, 961 (C. A. 2), certiorari denied, 319 U. S. 741.

Reasonable "services" and reasonable "facilities"—*i. e.*, "reasonable stockyard services"—must be furnished by a stockyard owner and a market agency with respect to (1) the "receiving" of livestock, (2) the "buying" of livestock, (3) the "selling"—on a commission basis or otherwise—of livestock, (4) the "marketing" of livestock, (5) the "feeding" of livestock, (6) the "watering" of livestock, (7) the "holding" of livestock, (8) the "delivery" of livestock, (9) the "shipment" of livestock, (10) the "weighing" of livestock, and (11) the "handling" of livestock. 7 U. S. C. 1952 ed. § 201 (b). These statutory terms are applicable to a wide variety of market conditions. Some of the stockyards are great terminal markets, and some are relatively small auction markets. A large terminal stockyard is a complex business enterprise. Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 190–193. It represents a large investment in land, buildings, and equipment. *Ibid.* "The main livestock terminals are South St. Paul, Sioux City, Omaha, Denver, Milwaukee, Chicago, Indianapolis, East St. Louis, St. Joseph, Kansas City, Wichita, and Fort Worth." *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), p. 41.[5] The size of the Denver market is revealed by these data as to the livestock received by

[5] The author of this article in the *1954 Yearbook of Agriculture* is Dr. Edward A. Duddy, Professor of Marketing (Emeritus), University of Chicago.

it in 1956: Cattle, 881,697; calves, 81,756; hogs, 569,559; sheep and lambs, 883,264. *Livestock Market News Statistics*, 1956 (Statistical Bulletin No. 209, U. S. Department of Agriculture), p. 15. See, also, *In re Denver Union Stockyard Company*, 10 Agr. Dec. 1033, 1038–1072. In addition to the terminal stockyards there are many other stockyards which are posted under the Act.

The "services" or "facilities" will necessarily vary depending on whether it is cattle or sheep or swine or horses or mules or goats that are being marketed. The term "livestock" as used in the Packers and Stockyards Act means "cattle, sheep, swine, horses, mules, or goats—whether live or dead" (7 U. S. C. 1952 ed. § 182 (4)), and different "services" and different "facilities" are necessary, in some respects, with respect to the different species of livestock. In a terminal stockyard, "[s]heep and hogs are usually housed in single or double-deck covered buildings. Covered buildings are desirable for protecting these species from unfavorable weather and for ensuring buyers of sheep and lambs that the fleeces are free from excess moisture. The sheep pens are equipped with water troughs, hay racks, and troughs for grain, and the hog pens are equipped with water troughs and sprinklers for showering during the heat of the summer. Hogs that are fed prior to sale are given shelled corn, which is usually scattered on the floor of the pen." Dowell and Bjorka, *Livestock Marketing*, pp. 106–107. Another example is in the marketing of hogs. "The hog inspection and dockage serv-

ice is a service or facility furnished at a stockyard" under the definition of "stockyard services" in the Packers and Stockyards Act. 34 *Op. Atty. Gen.* 267, 273–274 (opinion by Attorney General Stone, later Mr. Justice Stone). "Hog dockage is the amount that is deducted from the actual weight of a particular hog or number of hogs or some or all of them as an allowance to the buyer on account of the condition of the hog or hogs in question. * * * The rules of the Chicago Livestock Exchange" at the terminal stockyards in Chicago provided for the inspection and dockage of hogs at the Chicago market. *Id.* at 268–269. Also "services" for cattle received by rail are different from the "services" for cattle received by motor truck, and on the basis of "detailed testimony" as to the factual circumstances different rates may, accordingly, be reasonable. *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 69.

The facilities and services vary from market to market. In all respects "local conditions control the final arrangement and design of facilities and methods of operating. Each yard presents an individual problem due to the topography, size, shape, and location of its lands, the fixed surroundings, such as streets, railroad tracks, and packing plants, the climatic conditions, the receipts and dispositions by species and market classes, modes of transportation, hours of arrival, sizes of consignment, sizes of the scale drafts, and other related factors." *Suggestions for Improving Services and Facilities at Public*

Terminal Stockyards (U. S. Department of Agriculture, 1952), p. 2. See, also, Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 238–241.

The circumstances vary from market to market, and in addition there are variables in a particular market. Abnormal weather conditions, for example, should be considered by a stockyard owner in the discharge of his duty to furnish "reasonable stockyard services" with respect to the "holding" of the livestock—"holding" is one of the terms in the statutory definition of "stockyard services." *Illinois Packing Co.* v. *Union Stock Yard & Transit Co.*, 15 Agr. Dec. 1101, 1106–1110, decision on reconsideration, 16 Agr. Dec. 305, 306–309. If cattle "in holding pens at the stockyard were in distress from overheating," it was the duty of the stockyard owner to provide reasonably adequate cover, space, and water to protect the cattle. *Ibid.* On failure to furnish the "reasonable stockyard services," in circumstances of abnormal weather, the stockyard owner is liable for the loss of the cattle. *Ibid.* What is reasonable, in view of abnormal weather, depends of course on the facts. A flood in 1951 "inflicted serious damage to the physical property of the stockyard company [in Kansas City] and reduced its capacity to handle cattle receipts at its stockyard." *Flynn* v. *Kansas City Stock Yards Co.*, 12 Agr. Dec. 14, 24–25. The failure to make "services" or "facilities" available is not a failure to furnish "reasonable stockyard services" if the demand exceeds the reasonable capacity of the stockyard. *Ibid.*

There can be no doubt that the "services" and "fa-

cilities" to be furnished by a stockyard owner with respect to the "receiving" of livestock, the "feeding" of livestock, the "watering" of livestock, the "holding" of livestock, the "delivery" of livestock, and the "handling" of livestock[6] are not to be interpreted, as a matter of law, in an abstract, sterile way, but in view of the facts of a particular case. The 571 stockyards which are regulated under the Packers and Stockyards Act vary in size from the great terminal markets—such as Chicago and Denver—to small stockyards with only 20,000 square feet available for the handling of livestock[7]—exclusive of runs, alleys, or passageways—and the "services" and "facilities" to be furnished as "reasonable stockyard services" should correspond to the characteristics and circumstances in each market.

The "services" and "facilities" to be furnished by a stockyard owner or market agency with respect to the

[6] These factors are in the definition of "stockyard services." 7 U. S. C. 1952 ed. § 201 (b).

[7] By definition, the term "stockyard" means "any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce," but it does not include "a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than twenty thousand square feet." 7 U. S. C. 1952 ed. § 202 (a). Numerous stockyards have been posted for regulation. for the first time, in 1957. Compare, *e. g.*, *P & S. Docket for May 1957*, p. 3 with the *P. & S. Docket for June 1957*, p. 3 —these publications are issued by the Livestock Division, Agricultural Marketing Services, U. S. Department of Agriculture, in Washington, D. C.

"buying" of livestock, the "selling"—on a commission basis or otherwise—of livestock, and the "marketing" of livestock[8] also depend on the facts. The business practices or methods of buying, selling, and marketing livestock are not uniform at the posted stockyards under the Packers and Stockyards Act. "At terminal markets, market agency salesmen sell livestock received from producers on a consignment basis through direct negotiations with buyers. Livestock consigned to auction markets [*i. e.*, the other posted stockyards] is offered to buyers in sales rings and sold by auction methods." *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), p. 282. The "services" and "facilities" with respect to the buying, selling, and marketing of livestock at a terminal market are significantly different from the "services" and "facilities" at an auction market.[9] In addition, the methods of sale at the auction markets are not uniform. Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 256–266. "There are three distinct methods used for selling livestock at auctions: (1) Single animals or a few animals of fairly uniform quality and size, consigned by the same person and combined into a lot, are sold by the head; (2) Single animals or a few animals of fairly uniform quality and size, consigned by the same person and combined into a lot, are sold by weight; and (3) Animals are

[8] These factors are in the definition of "stockyard services." 7 U. S. C. 1952 ed. § 201 (b).

[9] The advantages and disadvantages of marketing livestock at an auction market are matters of controversy. Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 223–225.

graded, weighed, and sorted into lots of uniform quality and weight and are sold together, even if they belong to different consignors. The latter method is confined to hogs, lambs, and veal calves." *Ibid.*

The "stockyard services" to be furnished in a particular market are different, in some respects, from the requisite services at the time of the enactment of the Packers and Stockyards Act 36 years ago.[10] There has been a great increase, in recent years, in the volume of livestock received at the Denver market from motor trucks, and "[o]ne of the factors which appears to have been responsible for the increase in truck receipts at respondent's stockyards [*i. e.*, the terminal stockyards in Denver] has been the construction [by the owner of the stockyards] of cattle truck chutes on newly acquired land at which dock and pens have been constructed, and a viaduct constructed over the Burlington Railroad main line." *In re Denver Union Stockyard Company,* 10 Agr. Dec. 1033, 1062. The "services" are greater and more varied than at the time of the enactment of this legislative measure. *In re Market Agencies at Sioux City Stock Yards,* 9 Agr. Dec. 4, 19–103. New developments in transportation and communication since 1921, the date of the enactment of the Packers and Stockyards Act,

[10] "St. Louis had for many years a flourishing horse and mule market, largely conducted on respondent's premises [*i. e.*, the St. Louis National Stockyards]. Then the horse and mule facilities were used much more intensively than they are now. For nearly ten years the receipts of horses and mules decreased, the volume becoming so small" that by 1937 it was not earning operating costs. *In re St. Louis National Stockyards Co.*, 2 Agr. Dec. 664, 715.

have had a pronounced impact on our marketing system. Fowler, *The Marketing of Livestock and Meat* (1957 ed.), pp. 26–27; *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), pp. 95, 101, 489. Other changes in our economy or way of doing business have also affected the business operations at the stockyards. *Ibid.* See, also, *In re St. Louis National Stockyards Co.*, 2 Agr. Dec. 664, 669–670.

The Congress did not undertake in 1921, in the enactment of this Act, to foresee in detail the "services" and "facilities" to be furnished, day by day, in each market. The Congress wisely selected words of general import, in the Act, and left their application to the factual circumstances in each case. The terms of the statute call for a continuous process of application; relevance and reasonableness are variable in relation to the divergent and mutable situations in the marketing of livestock in the various stockyards. The application of the term "reasonable stockyard services" with respect to the many factors incident to the selling, buying, and marketing of livestock at a posted market, under this Act, cannot be determined by mere verbality as a matter of law.

2. The structure and purpose of the Act show that the application of the term "reasonable stockyard services" is dependent on the relevant factual circumstances

If one goes beyond the plain terms in the statute, the structure and purpose of the Act confirm what the text expressly provides. If the stockyard services, referred to in the Act, were self-defining terms,

so as to be rigidly applied as a matter of law, it would have been unnecessary to provide in the statute for the issuance of regulations by stockyard owners and market agencies with respect to the furnishing of those services in a particular market. The Act imposes, however, the "duty" on a stockyard owner to "establish, observe, and enforce just, reasonable, and non-discriminatory *regulations and practices* in respect to the furnishing of stockyard services * * *" (emphasis supplied). 7 U. S. C. 1952 ed. § 208. The duty imposed by the Act applies to "practices" as well as to "regulations." *Ibid.* Only "reasonable stockyard services" must be furnished by a stockyard owner (7 U. S. C. 1952 ed. § 205), and the owner is charged with the statutory duty of observing and enforcing reasonable practices and of issuing, observing, and enforcing reasonable regulations (7 U. S. C. 1952 ed. § 208).

In imposing the duty on a stockyard owner to issue regulations, the Congress gave recognition to the fact that the owner of a stockyard should be allowed—within the zone of reasonableness—to have supervision over the services and facilities in the owner's business. The Secretary of Agriculture is given substantially the same jurisdiction over stockyard rates and regulations which the Interstate Commerce Commission has over railroads (H. Rept. No. 77, 67th Cong., 1st sess., p. 10; *Tagg Bros.* v. *United States*, 280 U. S. 420, 435, fn. 3), and a railroad retains its "primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of

just for unjust charges" (*Interstate Com. Comm.* v. *Louisville & Nash. R. R.*, 227 U. S. 88, 92). The Secretary is authorized to prescribe regulations which must be observed if the Secretary decides "after full hearing" that "any rate * * * regulation or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory * * *" (Emphasis supplied). 7 U. S. C, 1952 ed. § 211. It cannot be gainsaid that the avowed purpose of Congress, in the enactment of this measure in 1921, was to provide for a stockyard owner to prescribe regulations, as to the services and facilities in the owner's stockyard, if the regulations thus prescribed are, in view of the facts, within the area or zone of reasonableness. "Subject to reasonable regulation, the right to control and conduct the business of a stockyards company remains in the company just as it did before the enactment of the [Packers and Stockyards] Act." *Houfburg* v. *Kansas City Stock Yards Co. of Maine*, 283 S. W. 2d 539, 544 (Mo.).

The broad scope of the regulations by a stockyard owner or market agency is underscored by the reference in § 310 of the Act to regulations which are "for or in connection with" the furnishing of reasonable stockyard services. 7 U. S. C. 1952 ed. § 211. If, after full hearing, the Secretary "is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, *for or in connection with the furnishing of stockyard services*, is or will be unjust, unreasonable, or discriminatory" [em-

phasis supplied], the Secretary may issue a cease and desist order and also prescribe what rate, charge, regulation, or practice will be just, reasonable, and nondiscriminatory. *Ibid.* The business practices that are "in connection with" the furnishing of the services or facilities at the stockyards are not further described or identified in the Act and are, necessarily, to be determined in view of their relevance and significance in the current of livestock marketing.[11]

[11] Section 310 of the Act refers to rates or charges—as well as regulations—prescribed by a stockyard owner or market agency, and in establishing reasonable rates consideration has been given to such business practices as "appraisal work," *viz.*, the practice of a market agency in sending, on request, a salesman to appraise the livestock on a patron's ranch or farm. *In re Market Agencies at Sioux City Stockyards*, 9 Agr. Dec. 4, 38–40. In some market situations, it is believed that "the market as a whole receives a direct benefit from this appraisal service in that it brings a flow of livestock to the market, thus providing a variety of livestock to fill the demands of order and packer buyers, and that, in turn, this attracts packer and order buyers to the market and increases the usefulness of the market as whole for all the patrons." *Id.* at 39. "The rules of the Sioux City Livestock Exchange classify appraisal trips as business soliciting trips and limit the number of trips which its members may make in the course of a month." *Id.* at 86. "The fact that the number of appraisal trips is limited by the rules of the Exchange indicates that its members believe that there is danger it will be overdone" in view of the fact that the rate of commission is fixed, under the Act, and an undue amount of appraisal work would unduly increase expenses. *Id.* at 87. Although the amount expended in getting and maintaining business is a matter of managerial judgment, nonetheless a rate, in order to be reasonable, should not be made to compensate for extravagant expenditures. *Acker* v. *United States*, 298 U. S. 426, 430–431; *Denver Stock Yard Co.* v. *United States*, 304 U. S. 470, 475–476.

3. *The long established administrative practice under the Act supports the view that the relevant facts—in the business areas involved—must be considered and evaluated in order to determine whether the regulations in this case are "unreasonable" so as to be violative of the statutory provisons*

Many regulations—which have been made effective since the Packers and Stockyards Act became effective in 1921—reveal the efforts by the industry and by the Secretary to apply the statutory terms to the factual complexities in this great current of business. Here, as in *Armour & Co.* v. *United States,* 312 U. S. 195, 197, the significance or reasonableness of the regulations must be evaluated in view of extensive facts in a specialized field. The respondent's contention (R. 5, 72) that the reasonableness of the regulations must be arrived at *in vacuo,* as a matter of law, is conflictive with the wide range of the administrative practice in the governance of livestock marketing at the posted stockyards. The following selections from various regulations illustrate, we believe, the relevant meaning that has been given, in practice over a long period of time, to the terms of the Act. The regulations adopted plainly show that the reasonableness of the regulations must turn on the facts.

The regulations at the Denver terminal stockyard in 1924 prohibited "dishonorable or uncommercial" conduct or "any practices * * * detrimental to the welfare of the market * * *." *Regulations of the Denver Live Stock Exchange* (revised 1924), p. 22,

rule 8, § 2.[12] The regulations also provided that "[a]ny member of this Exchange who shall solicit a shipment of stock already consigned to another member, either in transit or after its arrival at the yards, or who shall, by false representation in regard to the standing or character of any other member, attempt to secure the sale of any consignment," shall be deemed to be a violator of the rules of the Exchange, although a person is free to "solicit business in a fair and honorable way." *Id.* at p. 30, rule 13, § 5. The rule with respect to hog dockage specified the types of hogs and the number of pounds to be allowed for shrinkage or dockage on hogs of each group. *Id.* at p. 31, rule 13, § 3. Market agencies were prohibited by the 1924 regulations of the Exchange from acting in a "dual capacity of buyer and seller on any shipment of livestock consigned to them." *Id.* at p. 42, rule 27.

The regulations at the Chicago terminal market in 1924 provided that "[a]ny member of this Exchange who shall solicit a shipment of livestock consigned to another member, either in transit or after its arrival at the yards, or who shall, by misrepresentation in regard to the character or standing, or by the dissemination of any false report regarding any mem-

[12] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C. A livestock exchange, the members of which are "in the live stock commission business" at a particular market, is regarded as a market agency with respect to the issuance of regulations. 34 *Op. Atty. Gen.* 267, 268, 274.

ber, attempt to secure the sale of any consignment of livestock, shall be deemed guilty of uncommercial conduct" and in violation of the regulations. *Regulations of the Chicago Live Stock Exchange* (filed February 14, 1924), p. 23, rule XI, § 1.[13] Also, a "member engaged in the Chicago livestock trade and resident at Chicago may solicit business west of the Missouri River not exceeding thirty consecutive days, and not to exceed sixty-three days in any one calendar year." *Id.* at p. 20, rule X, § 2.[14]

The regulations at the Indianapolis terminal market in 1923 provided that "[n]o member of this Exchange shall pay a commission, or allow any rebate whatever, to any person acting as agent * * * of any buyer of livestock on this market, and any representation that such person acted as agent of the seller, rather than the buyer, shall be considered a violation of this section * * *." *Regulations of the Indianapolis Live Stock Exchange* (filed 1923), p. 46, rule IX, § 4.[15] "No member of this Exchange shall try to take a buyer from another member while said buyer is in member's pen or going to [the] pen with said member. Nor shall any member stand outside [the] stock pen while another

[13] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

[14] Reasonable rates cannot be made to compensate for unreasonable expenditures in so-called business getting. *Acker* v. *United States*, 298 U. S. 426, 430–431; *Denver Stock Yard Co.* v. *United States*, 304 U. S. 470, 475–476; *In re Market Agencies at Sioux City Stockyards*, 9 Agr. Dec. 4, 38–40, 86–87.

[15] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

member is trying to sell stock, or in any way interfere with said member while trading." *Id.* at p. 46, rule IX, § 5.

The owners of stockyards have, from time to time, issued regulations to prohibit methods of doing business which, in view of the facts, militate against the stability or integrity of the market. The regulations in the St. Joseph terminal market in 1923 provided that "[a]ny firm, corporation, or individual by themselves or their employees, detected using unfair, dishonest, or fraudulent practices, will be denied the privileges of these stockyards * * *." *Regulations of the St. Joseph Stock Yard Company* (filed 1923), p. 4, rule 3.[16] A similar rule was included in the regulations at other stockyards. See, *e. g.*, the regulations of the *Union Stock Yards Company of Omaha* (filed 1923), p. 4, rule 3; the *Sioux City Stock Yards Company* (effective 1928), p. 4, rule 3; the *Belt Railroad & Stock Yards Co.*, Indianapolis, Indiana (filed 1922), p. 5, rule 17; the *Fort Worth Stock Yards Company* (effective September 10, 1926), p. 6, § 9, rule 8; the *Denver Union Stock Yard Company* (effective 1923), p. 2, rule 3; and the *St. Louis National Stock Yards* (Supp. No. 9 to Tariff No. 1 effective January 5, 1924), No. 15.[17]

Numerous regulations have been issued by stockyard owners with respect to the solicitation of business by market agencies or dealers. *E. g.*, the regula-

[16] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

[17] The regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

tions of the *Denver Union Stock Yard Company* (effective June 1, 1938), provided that "[n]o market agency, dealer, or their employees shall solicit, or otherwise interfere with, the owners, drivers, attendants of incoming truck, wagon, or drive-in stock from the streets adjacent to or upon the property of this company prior to delivery into holding pens. * * * No person, without the express permission of this Company in writing, shall solicit any business in these yards for other markets, sales at outside feed yards or country points, or endeavor to secure customers to sell or purchase livestock elsewhere."[18] Similarly, the owner of the Kansas City stockyards made regulations effective, approximately 20 years ago, to prohibit a market agency or other person at that stockyard from soliciting business for other markets or endeavoring "to secure customers to sell or purchase livestock elsewhere."[19]

Various terminal stockyards have regulations which are similar to the contested rules of the Denver Union

[18] *Regulations of the Denver Union Stock Yard Company* (effective June 1, 1938), p. 4, § 11, rules 10 and 11. These regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

[19] *Regulations of the Kansas City Stock Yards Co.*, Tariff No. 7, § XII, rule 8, and subsequent tariffs to and including Tariff No. 12, rules 9 and 10. These regulations are in public documents on file in the Livestock Division, Agricultural Marketing Service, United States Department of Agriculture, in Washington, D. C.

Stock Yard Company.[20] Many terminal stockyards have regulations in effect to prohibit market agencies and dealers from engaging in various business activities in certain areas of the stockyards or in certain areas adjacent to the stockyards.[21] It is provided in

[20] See, Kansas City Stock Yards Co., Tariff 12, rules 9 and 10; Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, Supplement 13, rule 14; Los Angeles Union Stockyards Co., Tariff 16, item 10 (c); Union Stock Yards, San Antonio, Texas, Tariff 13, item 10 (c); The Ogden Union Stockyards Co., Tariff 12, rule 11; Union Stock Yards Co. of Montgomery, Tariff 11, rule 9; Jonesboro Stockyards, Inc., Jonesboro, Arkansas, Tariff 2, Supplement 7, rule 9; Stockton Union Stockyards, Stockton, California, Tariff 6, rules 1 (A), 1 (C) (3), 1 (C) (6), 1 (C) (7); The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, rules 13 and 14. These regulations are in public documents on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture. An adjudicatory proceeding is pending in the Department with respect to the validity of the regulations in the Los Angeles market. *Producers Livestock Marketing Association* v. *Los Angeles Union Stock Yards Company*, P. & S. Docket No. 2188. It is provided in the regulations applicable to market agencies and dealers at the Los Angeles market, *inter alia*, as follows: "No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase live tock elsewhere; or (2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or (3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard." Los Angeles Union Stockyards Co., Tariff 16, item 10 (c).

[21] See, Union Stock Yards, San Antonio, Texas, Tariff 13, item 10 (a) and (b); St. Paul Union Stockyards Co., Tariff 26, rule 8; Union Stock Yards Co. of Omaha, Tariff 17, rule 4; Kansas City Stock Yards Co., Tariff 12, rule 14; The Den-

the regulations in effect in 42 terminal stockyards that "stockyard services" will be furnished only to a "rea-

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ver Union Stock Yard Co., Tariff 14, item 10 (a); Ft. Worth Stockyards, Tariff 7, rule 9; Los Angeles Union Stockyards Co., Tariff 16, item 10 (a) and (b); The Sioux City Stock Yards Co., Tariff 15, rule 8; The Wichita Union Stock Yards Co., Tariff 13, § VI (C); St. Joseph Stock Yards Co., Tariff 20, item 11 (1); Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, rule 6; Billings Public Stockyards, Billings, Montana, Tariff 5, rule 8; Brighton Stock Yards Co., Brighton, Mass., Tariff 2, rule 4; The Buffalo Stock Yards, tariff 11, rule 4; The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2, rule 9; The Cleveland Union Stock Yards Co., Tariff 8, rule 9; The Union Stock Yards Co., Dayton, Ohio, Tariff 6, rule 6; The Detroit Stock Yards, Tariff 12, rule 4; The Evansville Union Stock Yards Co., Tariff 10, rule 12; Union Stockyards of Fargo, West Fargo, North Dakota, Tariff 7, rule 9; The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, rule 8; Port City Stockyards Co., Houston, Texas, Tariff 4, rule 7; The Belt Rail Road and Stock Yards Co., Indianapolis, Indiana, Tariff 8, rule 10; The Joplin Stockyards, Inc., Joplin, Missouri, Tariff 3, § 9 (C) and (J); Greater Little Rock Stockyards, Tariff 1, item 7; South Memphis Stock Yards Co., Tariff 11, § 13 (7); Milwaukee Stockyards, Tariff 3, rule 8; Union Stock Yards Co. of Montgomery, Tariff 11, rule 3 (c); The Ogden Union Stockyards Co., Tariff 12, rule 10; Parsons Stockyards Operating Co., Parsons, Kansas, Tariff 2, rule 4; The Peoria Union Stock Yards Co., Tariff 11, item 3; Pittsburgh Joint Stock Yards Co., Tariff 6, § 13 (4); Portland Union Stock Yards Co., Tariff 19, rule 9; Richmond Union Stock Yards Co., Tariff 9, rule 9; Mississippi Valley Stockyards, St. Louis, Missouri, Tariff 8, rule 4; Salt Lake Union Yards, Tariff 8, rule 8; South San Francisco Union Stockyards, Tariff 8, rule 9; Sioux Falls Stock Yards Co., Tariff 11, rule 8; Old Union Stockyards Co., Spokane, Washington, Tariff 9, rule 11; The Union Stock Yards Co., Springfield, Missouri, Tariff 3, item 13; Stockton Union Stockyards, Stockton, California, Tariff 6, rule 8; Tulsa Stockyards, Inc., Tariff 4, item 6 (1); Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2, rule 4. These regulations are in public docu-

sonable number" of market agencies and dealers, and the stockyard companies reserve the right to refuse to furnish any service to market agencies and dealers in excess of the number considered by the stockyard companies to be reasonable. [22] It is the general prac-

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ments on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture, in Washington, D. C.

[22] See, Union Stock Yard Co. of Baltimore County, Maryland, Tariff 11, rule 2; Billings Public Stockyards, Billings, Montana, Tariff 5, rule 15 (B); The Buffalo Stock Yards, Tariff 11, rule 3; The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2, rule 13; The Cincinnati Union Stock Yard Co., Tariff 12, rule 9; The Cleveland Union Stock Yards Co., Tariff 8, rule 2 (b); The Union Stock Yards Co., Dayton, Ohio, Tariff 6, Rule 9; The Detroit Stock Yards, Tariff 13, rule 3; The Evansville Union Stock Yards Co., Tariff 10, rule 2; Union Stockyards Co. of Fargo, West Fargo, N. D., Tariff 7, rule 1 (B); The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, rule 10; Fort Worth Stockyards, Tariff 7, rule 2; Port City Stock Yards Co., Inc., Houston, Texas, Tariff 4, rule 4; The Belt Rail Road and Stock Yards Co., Indianapolis, Ind., Tariff 8, rule 2; Jonesboro Stockyards, Inc., Jonesboro, Ark., Tariff 2, rule 4; The Joplin Stockyards, Inc., Joplin, Mo., Tariff 3, § 9 (G); Greater Little Rock Stockyards, Tariff 1, item 11; Los Angeles Union Stockyards Co., Tariff 16, item 4; Bourbon Stock Yard Co., Louisville, Ky., Tariff 17, rule 2; Dixie National Stock Yards, Inc., Memphis, Tenn., Tariff 7, § 6; South Memphis Stock Yards Co., Tariff 11, § 6; Milwaukee Stockyards, Tariff 3, rule 10; Union Stock Yards Co. of Montgomery, Tariff 11, rule 2; Oklahoma National Stock Yards Co., Tariff 12, rule 9; Parsons Stockyards Operating Co., Parsons, Kan., Tariff 2, rule 6; The Peoria Union Stockyards Co. Inc., Tariff 11, item 13; Pittsburgh Joint Stock Yards Co., Tariff 6, § 13 (2); Portland Union Stock Yards Co., Tariff 19, rule 15; Richmond Union Stock Yards Co., Tariff 9, rule 2; Union Stock Yards, San Antonio, Tariff 13, item 1; South San Francisco Union Stockyards, Tariff 8, rule 14; The Sioux City Stockyards Co., Tariff 15, rule 13; Sioux Falls Stock Yards Co., Tariff 11, rule 13; Old Union Stockyards Co., Spokane, Wash., Tariff 9, rule 2; The Union

tice of the stockyard companies to promulgate rules whereby stockyard services are denied to any market agency or dealer who engages in unfair, dishonest, or fraudulent practices, or who destroys stockyard property or who engages in other proscribed activities.[23]

Stock Yards Co., Springfield, Mo., Tariff 3, item 10; Stockton Union Stockyards, Stockton, California, Tariff 6, rule 1 (B); Tulsa Stockyards, Inc., Tariff 4, item 6 (8); The Wichita Union Stock Yards Co., Tariff 13, § VI (G); Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2, rule 9; St. Paul Union Stockyards Co., Tariff 26, rule 15; Kansas City Stock Yards Co., Tariff 12, rule 6; The Denver Union Stock Yard Co., Tariff 14, item 4. These regulations are in public documents on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture, in Washington, D. C.

[23] See, Union Stock Yard Co. of Baltimore County, Tariff 11, rules 11 and 12; Billings Public Stockyards, Billings, Montana, Tariff 5, rules 9 and 15 (F); Brighton Stock Yards Co., Brighton, Mass., Tariff 2, rule 3; The Buffalo Stock Yards, Tariff 11, rule 13; The Bushnell Stock Yards Co., Bushnell, Ill., Tariff 2, rules 10 and 11; The Union Stock Yard and Transit Co. of Chicago, Tariff 17, § 11; The Cincinnati Union Stock Yard Co., Tariff 12, rule 13; The Cleveland Union Stock Yards Co., Tariff 8, rule 14; The Union Stock Yards Co., Dayton, Ohio, Tariff 6, rule 11; The Detroit Stock Yards, Tariff 12, rule 12; The Evansville Union Stock Yards Co., Tariff 10, rule 8; Union Stockyards of Fargo, West Fargo, North Dakota, Tariff 7, rule 10; The Fort Smith Stockyards, West Fort Smith, Oklahoma, Tariff 2, rules 1, 2 and 21; Fort Wayne Union Stock Yards Co., Tariff 6, rule 4; Fort Worth Stockyards, Tariff 7, rules 6, 8, and 13; Port City Stock Yards Co., Houston, Texas, Tariff 4, rules 10 and 12; The Jersey City Stock Yards, Inc., Tariff 2, § IX; Jonesboro Stockyards, Inc., Jonesboro, Ark., Tariff 2, rules 1 and 6; The Joplin Stockyards Inc., Joplin, Mo., Tariff 3, §§ 9 (D), 9 (E), and 9 (I); Union Stock Yard Co. of Lancaster, Tariff 10, p. 3; Greater Little Rock Stockyards, Tariff 1, items 8

Footnote 23—continued.

and 9; Los Angeles Union Stockyards Co., Tariff 16, item 1; Bourbon Stock Yard Co., Louisville, Ky., Tariff 17, rule 9; Dixie National Stock Yards, Inc., Memphis, Tenn., Tariff 7, § 12 (3); South Memphis Stock Yards Co., Tariff 11, § 13 (4); Milwaukee Stockyards, Tariff 3, rule 9; Union Stock Yards Co. of Montgomery, Tariff 11, rule 14; Farmers National Stock Yard Co., Muncie, Ind., Tariff 2, rule 7; Nashville Union Stock Yards, Inc., Tariff 9, rules 5 and 6; St. Louis National Stockyards Co., Tariff 9, § XV; Union Stock Yard & Market Co., New York, New York, Tariff 7, item 7 (1); The Ogden Union Stockyards Co., Tariff 12, rule 17; Oklahoma National Stock Yards Co., Tariff 12, rule 11; Parsons Stockyards Operating Co., Parsons, Kansas, Tariff 2, rules 9, 10, and 11; The Peoria Union Stock Yards Co., Tariff 11, item 1; Pittsburgh Joint Stock Yards Co., Tariff 6, § 13 (8) and (9); Portland Union Stock Yards Co., Tariff 19, rules 10 and 14; Richmond Union Stock Yards Co., Tariff 9, rule 13; St. Joseph Stock Yards Co., Tariff 20, item 11 (3) and (4); Mississippi Valley Stockyards, St. Louis, Mo., Tariff 8, rule 1; Salt Lake Union Stock Yards, Tariff 8, rule 5; Union Stock Yards, San Antonio, Tariff 13, item 2; South San Francisco Union Stockyards, Tariff 8, rule 10; Seattle Union Stockyards Co., Tariff 1, item 11; The Sioux City Stock Yards Co., Tariff 15, rule 9; Sioux Falls Stockyards Co., Tariff 11, rule 9; Old Union Stockyards Co., Spokane, Washington, Tariff 9, rule 10; Springfield Stock Yards Co., Springfield, Ill., Tariff 2, rules 4 and 7; The Union Stock Yards Co., Springfield, Mo., Tariff 3, item 12; Stockton Union Stockyards, Stockton, California, Tariff 6, rule 9; Texarkana Stockyards, Inc., Texarkana, Texas, Tariff 3, item 7 (1), (2), and (8); Tulsa Stockyards, Inc., Tariff 4, item 6 (2) and (5); The Wichita Union Stock Yards Co., Tariff 13, § VI (D) and (E); Vinita Stockyards, Inc., Vinita, Oklahoma, Tariff 2, rule 11; St. Paul Union Stockyards Co., Tariff 26, rule 9; Union Stock Yards Company of Omaha, Tariff 17, rule 3; Kansas City Stock Yards Co., Tariff 12, rules 1 and 2; The Denver Union Stock Yard Co., Tariff 14, item 1. These regulations are in public documents on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture, in Washington, D. C.

The regulations issued by the Secretary [24] also manifest the administrative practice of interpreting the terms of the Act on the basis of the factual circumstances in each market. See, *e. g.*, 9 CFR, 1956 Supp., § 201.79 (b); 9 CFR (1st ed., 1939), §§ 201.16 and 201.17, and 1956 Supp., §§ 201.71–201.85. The assignment of pens and facilities by a stockyard owner, an important stockyard service, "shall be made, reviewed annually or oftener, if conditions warrant, and adjusted or changed, in number or location, on the basis of the availability of pens and facilities, the need of the registrant for such assignment, volume and kind of livestock handled, the number, size, character, and kind of consignments received or lots purchased, the seniority of the market agency or dealer, the operating conditions of the stockyard, and other pertinent considerations * * *." 9 CFR, 1956 Supp., § 201.79 (b).[25] Plainly, this is a recognition of the fact that

[24] The regulations by the Secretary were issued pursuant to 7 U. S. C. 1952 ed., § 228.

[25] A stockyard owner shall not, however, "discriminate *unfairly* with respect to the utilization of pens, alleys, or buildings, for the yarding or handling of livestock * * *." [Emphasis supplied.] 9 CFR (1st ed. 1939), § 201.16 and 1956 Supp., § 201.79 (a). A stockyard owner should "exercise reasonable care and promptness in respect to yarding, feeding, watering, weighing, and otherwise handling livestock to prevent waste of feed, shrinkage, injury, death, or other unavoidable loss." 9 CFR (1st ed. 1939), § 201.17, and 1956 Supp. § 201.82. The regulations by the Secretary "shall not prevent the legitimate application or enforcement of any valid bylaw, rule or regulation, or requirement of any exchange, association, or other organization, or any other valid law, rule, or regulation, or requirement to which any packer, stockyard owner, market agency, dealer, or licensee shall be subject which is not inconsistent or in conflict with the act and the regulations in this part." 9 CFR, 1956 Supp., § 201.4 (a).

the livestock industry, far from uniform in character, is a huge and complex affair and that uniformity of regulation cannot be applied amid the diversities of the market place; that in order for the terms of the Act to have practicality, the regulations under the statute must be written in view of the differences in market structures, the differences in trade practices, the differences in the degree of technology, and the differences in a variety of respects, market by market. The adjudicatory decisions by the Judicial Officer also reveal that the statutory terms are general standards to be applied not in an artificial way but to the different and changing situations in a great industry in operation. See, *e. g., Gilbert R. Smith* v. *Union Stockyards Co.*, 9 Agr. Dec. 588, 597; *Flynn* v. *Kansas City Stock Yards Co.*, 12 Agr. Dec. 14, 23–27; *Farmers Union Livestock Ass'n* v. *St. Paul Union Stockyards*, 12 Agr. Dec. 1026, 1032–1033; *Dougherty* v. *Union Stock Yard & Transit Co.*, 13 Agr. Dec. 239, 245.

This administrative practice is of wide import. It is the Department's purpose to maintain "the integrity of the public markets," and market agencies or dealers who do not conform to a "high code of ethics" are not entitled to transact business at the public stockyards. *Flynn* v. *Kansas City Stockyards Co.*, 12 Agr. Dec. 14, 20–21. A stockyard owner and the patrons of the market are seriously injured if a dealer or market agency is guilty of dishonest practices in the marketing of livestock. *Id.* at 22. See, also, *In re Producers Livestock Mktg. Assn.*, 14 Agr. Dec. 109, 110–120. Absolute integrity on the part of

a market agency or dealer is essential in the operation of public stockyards.[26] Market agencies or dealers who have been guilty of dishonest practices are not entitled, as a matter of right, to receive stockyard services. See *e. g., Cella* v. *United States,* 208 F. 2d 783, 785–790 (C. A. 7), certiorari denied, 347 U. S. 1016; *Kelly* v. *Union Stockyards & Transit Co. of Chicago,* 190 F. 2d 860, 861–864 (C. A. 7). "Mere registration as a market agency with the Secretary of Agriculture does not automatically force a stockyard company under any and all conditions to provide the registrant with facilities to do business." *Gilbert R. Smith* v. *Union Stockyards Co.,* 9 Agr. Dec. 588, 597.

The broad and long-established practice, in the Department and in the industry, in the interpretation of the Act is also reflected in various cases. An example of the discretion vested in a stockyard owner with respect to the furnishing of stockyard services is found in *Farmers Union Livestock Ass'n* v. *St. Paul Union S. Co.,* 97 F. Supp. 539, 540 (D. Mont.), in which it was held that the allocation of stockyard pens, at a posted stockyard, on the basis of the amount of business done by commission firms to whom the pens are assigned is not unreasonably discriminatory so as to impinge on the duty of the stockyard

[26] "[T]he success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value. To say that much depends on the integrity and ethics of those engaged in marketing livestock is speaking mildly." *Midwest Farmers* v. *United States,* 64 F. Supp. 91, 95 (3-Judge Court, D. Minn.).

owner to furnish reasonable stockyard services on reasonable request. Another similar decision under the Act is *DeVries* v. *Sig Ellingson & Co.*, 100 F. Supp. 781, 786 (D. Minn.), affirmed, 199 F. 2d 677 (C. A. 8), certiorari denied, 344 U. S. 934. Also a stockyard owner may protect its lawful interests by refusing to furnish any stockyard service to dishonest dealers or dishonest traders. *Carnes* v. *St. Paul Union Stockyards Co.*, 175 Minn. 294, 221 N. W. 20, 21. See, also, *Birmingham* v. *Rice Bros.*, 238 Iowa 410, 26 N. W. 2d 39, 43, certiorari denied, 332 U. S. 768. It was held in *Kelly* v. *Union Stockyard & Transit Co. of Chicago*, 190 F. 2d 860, 864 (C. A. 7), that issues as to alleged unreasonable discrimination by a stockyard owner, in the furnishing of stockyard services, are "primarily factual rather than legal," and present "questions in which 'the enquiry is essentially one of fact and discretion' * * *." See, also, *Fort Worth Stockyards Co.* v. *Brown* (Tex. C. C. A.), 161 S. W. 2d 549, 553–554.

The administrative practice in the interpretation of the statute is, we submit, entitled to great weight, and should not be overturned unless clearly wrong or unless a different construction is plainly required. *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396; *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 199; *Fleming* v. *Mohawk*, 331 U. S. 111, 116; *Boutell* v. *Walling*, 327 U. S. 463, 470–471; *United States* v. *American Trucking Ass'n*, 310 U. S. 534, 549. It has been familiar doctrine since *Edwards* v. *Darby*, 12 Wheat. 206, 210, that "the contemporaneous construction of those who were called upon to act under the law, and were

appointed to carry its provisions into effect, is entitled to very great respect." Moreover, in the present case the administrative construction is, we submit, plainly right.

C. The Court of Appeals Erred in Holding that the Regulations Are, on Their Face, Illegal as a Matter of Law Under the Packers and Stockyards Act

The regulations were nullified by the Court of Appeals on a record that (1) is void of an administrative finding that the regulations are unreasonable and (2) is barren of evidence to show that the regulations are unreasonable.

The respondent in this Court, *i. e.*, the complainant in the administrative proceeding, filed an "Election to Rest" stating that in the administrative proceeding it "will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter of law" (R. 72). The respondent in this Court elected, as the complainant in the administrative proceeding, to stake its case on the proposition that the regulations are invalid, on their face, as a matter of law and that all evidence is, therefore immaterial in the proceeding (R. 72). The only question, therefore, before the Judicial Officer in the Department of Agriculture was whether the regulations are, on their face, illegal as a matter of law, and being unable to conclude that the regulations considered *in vacuo* are, as a matter of law, illegal, the Judicial Officer dismissed the complaint (R. 16, 33). Specifically, the Judicial Officer did not decide the question which the respondent in this Court could have presented during the administrative hearing—

but which was not presented—*i. e.*, as to whether the regulations are, in view of the facts, unreasonable and, therefore, invalid.[27]

The Court of Appeals resolved the issues in the case by assuming a factual situation which is not in the case. The Court of Appeals held:

> The compulsion of the regulation is in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act, 7 U. S. C. 1952 ed. § 205] which contemplates and imposes the duty upon marketing agencies to render reasonable services to its [*sic*] customers at *every* stockyard where they do business. If by rendering a reasonable service for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency cannot perform its statutory duty in one regard or another (R. 82).

The decisiveness of that holding by the Court of Appeals is revealed by its explanation that "[a]lthough it may be argued that attempts, successful or

[27] The Judicial Officer had no statutory authority in the adjudicatory proceeding to compel the respondent in this Court, *i. e.*, the complainant in the administrative proceeding, to rely on an additional issue—an issue which was antithetical to its position that its books and records should not be made available to the Stock Yard Company for the purpose of presenting evidence at a hearing on the complaint (R. 54–56). The burden of proof, in the administrative proceeding, was on the complainant in that proceeding. 5 U. S. C. 1952 ed., § 1006; *Louisville & Nash. R. R.* v. *United States*, 238 U. S. 1, 11; *Platt* v. *Lecocq*, 158 Fed. 723, 728 (C. A. 8). See, also, *Power Comm'n* v. *Hope Gas Co.*, 320 U. S. 591, 602.

otherwise, by a marketing agency to divert business from a stockyard may result in disharmony between the parties [*i. e.*, the market agency and the stockyard owner] and thereby lower the ability of both to render efficient service [*i. e.*, reasonable stockyard services], still such argument, *even if proved to be soundly based in fact* [emphasis supplied], has no legal significance" (R. 82).

1. The regulations are not illegal as a matter of law merely because in a certain hypothetical situation, referred to by the Court of Appeals, the regulations would seem to be unreasonable

There is nothing in the record to support the hypothesis on which the Court of Appeals disposed of the case, and the Court's opinion is based only on the supposal set forth in its opinion. No witness testified in the administrative proceeding. No stipulation of facts was filed. No factual allegation was made and admitted with respect to whether a market agency at the Denver market is also a registrant at another competing posted stockyard or, for that matter, how the regulations would, in practice, affect that situation if it exists. No facts were asserted by the Court of Appeals, but the Court disposed of the case on the basis of dualistic assumptions of fact, *viz.*, (1) that a market agency at Denver is also a registrant at another competitive posted stockyard, and (2) that "by rendering reasonable service for a Colorado customer at one stockyard" it is "prohibited from rendering reasonable service for the same or a different Colorado customer at another stock-

yard" (R. 82). No basis exists for either of the Court's assumptions. The second of the two assumptions by the Court consists of two conclusions which, obviously, would have their foundation in further assumptions. It, necessarily, requires an inquiry into the facts to determine whether—in the Court's *suppositum*—the hypothetical market agency was "rendering a *reasonable* [emphasis supplied] service for a Colorado customer at one stockyard" in the situation which was undisclosed in the Court's assumption of facts (R. 82). It also requires an inquiry into the facts to determine whether the hypothetical market agency would be "prohibited," by the regulation, "from rendering *reasonable* service for the *same or a different* [emphasis supplied] Colorado customer at another stockyard" in whatever the situation is to which the Court alludes (R. 82). It cannot be determined *ex hypothesi* whether the respondent market agency is a registrant at competitive posted stockyards,[28] and there is nothing in the record to admeasure the impact of the regulations. The frailties of the hypothesis are visible, but it is sufficient that there is nothing in the record to support the hypothesis or any part of it.

The holding by the Court of Appeals is squarely in conflict with *Associated Press* v. *Labor Board*, 301 U. S. 103, 132, in which it was held that courts in

[28] A justiciable controversy is not presented by the hypothetical case on which the Court of Appeals disposed of the case. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241; *Sprunt & Son* v. *United States*, 281 U. S. 249, 255–257; *Edward Hines Trustees* v. *United States*, 263 U. S. 143, 148; *Mills* v. *Green*, 159 U. S. 651, 653.

passing on the validity of a regulation, under an Act of Congress, are to dispose of the case "upon the basis of the facts disclosed," never on the basis of "non-existent and assumed circumstances." It was argued in the *Associated Press* case, *supra,* that the regulation would be illegal in a certain hypothetical situation but that argument was disposed of by the Court's statement that "[n]o such question is here for decision. * * * [The appellant] seeks to bar all regulation by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of the facts disclosed, never with non-existent and assumed circumstances." It is not the function of the courts to give opinions upon abstract propositions (*Mills* v. *Green,* 159 U. S. 651, 653), and a justiciable controversy is "distinguished from a difference or dispute of a hypothetical or abstract character" (*Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240). See, also, *Federal Trade Commission* v. *National Lead Co.,* 352 U. S. 419, 431.

The principle which was applied in *Associated Press* v. *Labor Board, supra,* 301 U. S. at 132, is particularly forceful with respect to statutory terms of generality and adaptability, such as those in the case at bar. The Packers and Stockyards Act was designed to have meaning and significance in the practical affairs of the Nation's livestock industry, *e. g.,* to abate the market practices which are not within the statutory criteria and to require practices which, in view of the needs of the market, are conducive to

the effectuation of the legislative goal.[29] Plainly it was not the purpose of Congress to require that regulations in order to be valid must be reasonable as applied to all abstract, imaginary, or hypothetical situations. To interpolate into the statutory provision a requirement that the regulations must be

[29] The Court of Appeals by its imaginant method of deciding the case necessarily ignored the principle that presumptive weight should be given to an administrative agency's decision concerning the relevance of facts to be taken into account and the weight to be given to those facts. See, *e. g.*, *United States* v. *Jones*, 336 U. S. 641, 664; *Interstate Commerce Comm.* v. *Parker*, 326 U. S. 60, 65; *United States* v. *Detroit Navigation Co.*, 326 U. S. 236, 241; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303–304; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481. The broad terms of the statute are for application by the administrative agency, in the exercise of its discretion, to an infinite variety of circumstances which may occur in specific instances. *Ibid.* Here, as in *Far East Conf.* v. *United States*, 342 U. S. 570, 574–575, the administrative agency "should not be passed over" in the resolution of an issue as to the reasonableness of the regulations. The case of *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S. W. 1015 is manifestly inapposite. In the *Grissim* case, the stockyard owner sought an injunction against an employee of a commission firm, J. D. Bolling & Co., but the Court said that, under the pleadings "no complaint is made by complainant against J. D. Bolling & Co., notwithstanding that it indisputably appears that defendant, in doing such acts as he is doing upon complainant's premises, is acting as the agent of J. D. Bolling & Co., and in their behalf; that the bill [of complaint] does not allege any specific acts of misconduct against the defendant as the agent of J. D. Bolling & Co." 280 S. W. at 1018. A case is, of course, "to be read in the light of the facts of the case" (*Armour & Co.* v. *Wantock*, 323 U. S. 126, 133), and general statements in an opinion which go beyond the case are not controlling (*Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Humphrey's Executor* v. *United States*, 295 U. S. 602, 626–627; *Osaka Shosen Line* v. *United States*, 300 U. S. 98, 102–104).

reasonable as applied to artificial, hypothetical, or assumed situations would so obviously foster the enfeeblement and devitalization of the Act that it cannot be accepted as a proper interpretation of the purpose of Congress. A regulatory statute should be interpreted so that its effectiveness will not be impaired, and, if possible, an interpretation should be adopted which "will preserve the vitality of the Act and the utility of the language * * *." *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 392. See, also, *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 330.

2. The regulations are not as a matter of law unreasonable in their entirety merely because—as held by the Court of Appeals—in a certain hypothetical situation a part of the regulations would be unreasonable

The regulations apply to dealers as well as to market agencies (R. 12, 39). The statutory provision, however, relied on by the Court of Appeals relates to market agencies but not to dealers (R. 82). The Court of Appeals concluded that the regulations are "in immediate conflict with the requirement of Sec. 304 [of the Packers and Stockyards Act, 7 U. S. C. 1952 ed. § 205] which contemplates and imposes the duty upon marketing agencies to render reasonable services to its [*sic*] customers at *every* stockyard where they do business" (R. 82). But nothing is said in that statutory provision about a duty on the part of the dealers, and nothing is said about dealers in the opinion by the Court of Appeals. The assumed case on which the Court of Appeals disposed of the case does not relate to a dealer (R. 82), and if it did in-

volve a dealer there would be no impingement upon the statutory provision referred to by the Court of Appeals, *scil.*, 7 U. S. C. 1952 ed. § 205, which imposes a duty on stockyard owners and market agencies but not on dealers.

There is, manifestly, no reason for nullifying the regulations with regard to dealers. Even if the regulations in the hypothetical situation referred to by the Court of Appeals are discriminatory or unreasonable as to market agencies—under the statutory section referred to—there is no ground for the decretorial action of the Court in striking down, *per saltum*, the regulations with respect to dealers also. It was clearly erroneous for the Court, in view of its jurisdiction (5 U. S. C. 1952 ed. § 1039 (a); 7 U. S. C. 1952 ed. § 211), to nullify regulatory provisions which have not been challenged and which are clearly not invalid under the provision in the Act relied on by the Court.

Assuming, *arguendo*, that the regulations are invalid as to market agencies, nonetheless the regulations should not have been declared invalid as to dealers also, and the Court should have remanded the case to the Secretary for further proceedings in accordance with the Act and the Court's opinion. The "function of the reviewing court ends when an error of law is laid bare," and the proceeding should then be remanded to the administrative agency "for reconsideration." *Federal Power Com.* v. *Idaho Power Co.*, 344 U. S. 17, 20. See, also, *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 373–376; *Federal Comm'n* v. *Broadcasting Co.*, 309 U. S. 134, 141–146; *Trade*

Comm'n v. *Morton Salt Co.*, 334 U. S. 37, 55. Here the regulations as to dealers are not subjected to attack in this litigation, and the Court of Appeals plainly erred in ordering the Secretary to issue a cease and desist order as to the regulations *in toto*.

The interdictory action of the Court of Appeals, as to the regulative provisions applicable to dealers, is also conflictive with the authority of the Secretary under the Packers and Stockyards Act. 7 U. S. C. 1952 ed. § 211. If regulatory provisions are, in whole or in part, "unjust, unreasonable, or discriminatory," the Secretary may determine and prescribe what regulations are or will be just, reasonable, and non-discriminatory to be thereafter followed and observed by market agencies or stockyard owners. *Ibid.* The judgment of the Court of Appeals deprives the Secretary of his statutory authority even assuming, *arguendo*, the invalidity of the regulations issued by the stockyard owner. Instead of ordering the Secretary to issue a cease and desist order, with respect to the regulations in their entirety, the Court of Appeals should have remanded the proceeding to the Secretary for further action, within the discretion of the Secretary, relative to the regulatory provisions. The Secretary is "the guardian of the public interest" under this Act. *United States* v. *Morgan*, 313 U. S. 409, 415. See, also, *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535–536.

3. In the total absence of any evidence to show that the regulations are unreasonable, the Court of Appeals erred (a) in holding that the regulations are, as a matter of law, unreasonable, and (b) in requir-

ing the administrative agency to issue a cease and desist order with respect to the regulations. The decision of the Judicial Officer in the Department of Agriculture—that the regulations are not, on their face, illegal as a matter of law—was correct, and should have been affirmed by the Court of Appeals

The issues in the case are within the narrow confines of the record. Here, as in *United States* v. *Automobile Workers*, 352 U. S. 567, 592, the respondent, as the complainant in the administrative proceeding, undertook to shape the litigation so as to secure a comprehensive and rigid ruling as to the meaning of the terms in the Act—and thereby avoid the Stock Yard Company's avowed intention to explore the facts (R. 47–51). The respondent elected, as the complainant in the administrative proceeding, to stake its case on the proposition that all evidence is immaterial and that the regulations are on their face illegal as a matter of law (R. 72). The covert and sometimes difficult issues of fact in this wide area of business complexity, in evaluating the reasonableness of regulations, cannot be overleaped by an election, in an administrative proceeding, to foreclose all evidence, as immaterial, in the application of the broad and supple terms in the statute.

As we have shown, *supra*, pp. 26–52, the terms of the Act do not lend themselves to application with exactitude as a matter of law but constitute a policy to be followed in view of the variant and changeable situations in the many stockyards throughout the country. The application of the statutory provision for "rea-

sonable stockyard services," as we have shown, *supra*, pp. 26–52, turns on the exigencies of a particular situation; the application of the Act is to be made to the facts of a particular case, and not by mechanical application of a fixed rule of law. Reasonable stockyard services are to be furnished in accordance with the needs of the market, from time to time, to the needs emergent in modern war as well as the needs that have their genesis in the dynamic structure of our growing and changing economy.

The statutory provisions are not, in this respect, novelties. It is f miliar doctrine that "few words possess the precision of mathematical symbols," and "most statutes must deal with untold and unforeseen variations in factual situations * * *." *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340. The statutory term "reasonable stockyard services," is, in character, similar to the term "ordinary * * * expenses" which has been characterized as "a variable affected by time and place and circumstance" (*Welch* v. *Helvering*, 290 U. S. 111, 113–114). There is no "verbal formula that will supply a ready touchstone" for deciding what is ordinary (*id.* at 115), and likewise the scope or ambit of the statutory provisions for "reasonable stockyard services" upon "reasonable request" cannot be determined without the consideration and evaluation of the relevant factual circumstances. Here, as in *First National Bank* v. *Beach*, 301 U. S. 435, 438 "[h]ypothetical situations are laid before us, and the argument is pressed that the definition will breed absurdity if applied to this one of them or that," but, said the Court, "[w]e refuse to

be led away from the limitations of the concrete case. The words 'primarily engaged', as we find them in the first branch of the definition, do not constitute a term of art. * * * In every case the totality of the facts is to be considered and appraised. We pass to that appraisal here." *Id.* at 438–439.

Whether it is the reasonableness of the rates at a stockyard or the reasonableness of regulations at a stockyard, the statutory standard is the same. "Whenever, after full hearing upon a complaint * * * or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative * * *, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable or discriminatory," the Secretary may determine and prescribe what will be the just and reasonable rate or charge and what regulation or practice is or will be just, reasonable, and non-discriminatory, to be thereafter followed. 7 U. S. C. 1952, ed. § 211. The reasonableness of rates under the Packers and Stockyards Act depends on the evidence (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 55, 71; *Acker* v. *United States,* 298 U. S. 426, 430–431, 434; *Denver Stock Yard Co.* v. *United States,* 304 U. S. 470, 485; *Morgan* v. *United States,* 298 U. S. 468, 480; *United States* v. *Morgan,* 313 U. S. 409, 417), and likewise the reasonableness of regulations, as to stockyard services, depends on the evidence. "'Unreasonable' is not a word of fixed content and whether preferences or advantages are

unreasonable must be determined by an evaluation of all cognizable factors which determine the scope and nature of the preference or advantage." *Swift & Co.* v. *Wallace,* 105 F. 2d 848, 854–855 (C. A. 7). Neither reasonable rates for stockyard services nor reasonable regulations for stockyard services are determined or established as a matter of law in the abstract or on the basis of imaginary facts.

The Packers and Stockyards Act vests in the Secretary "substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads" (*Tagg Bros.* v. *United States,* 280 U. S. 420, 435, fn. 3), and in determining whether the required statutory services are being furnished, within the zone of reasonableness, it is necessary for the administrative judgment to be arrived at on the basis of the infinite variety of circumstances which are presented in evidence in a specific case (*Barringer & Co.* v. *United States,* 319 U. S. 1, 6; *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60, 65; *United States* v. *Detroit Navigation Co.,* 326 U. S. 236, 241; *United States* v. *Jones,* 336 U. S. 641, 664). Whether rates are reasonable or involve an unjust discrimination "is a question of fact for the Commission's determination" (*Barringer & Co.* v. *United States,* 319 U. S. 1, 6), and whether regulations are reasonable is a question of fact for the administrative agency to determine on the basis of the relevant evidence at the hearing. A hearing refers of course to a proceeding "in which evidence is received and weighed by the trier of the facts." *Shields* v. *Utah Idaho R. Co.,* 305 U. S. 177,

182. And a "finding without evidence is arbitrary and baseless," *Interstate Com. Comm.* v. *Louisville & Nash. R. R.*, 227 U. S. 88, 91. The regulations could be set aside only on the basis of evidence that they are unjust or unreasonable. *Baltimore & O. R. R.* v. *United States*, 277 U. S. 291, 300.

The principles here, of course, are of general and wide application, and are not confined to the Packers and Stockyards Act and the Interstate Commerce Act. It has been held that "[s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint." *Montana-Dakota Co.* v. *Public Serv. Co.*, 341 U. S. 246, 251. "Questions of reasonableness are necessarily questions of relation and degree," and "each case demands a close scrutiny of its own facts." *Sugar Institute* v. *United States*, 297 U. S. 553, 600. "Unreasonableness is not made out by mere assertion" (*Swift & Co.* v. *United States*, 343 U. S. 373, 383), and *a fortiori* unreasonableness is not established by mere speculation or surmise based on a record that is barren of evidentiary facts.

The respondent contended in the administrative proceeding and in the Court of Appeals that the regulations are illegal on their face as a matter of law (R. 5, 56, 72), but the Court of Appeals failed to apply the terms of the Act as a matter of law. The Court fell back on hypothesis, and without any record on which to determine whether the assumed circumstances are correct the Court decided the case. As we have shown, *supra*, pp. 54–58, the statutory terms are not to be applied to supposed facts, but to actual situations. Whether the contested regula-

tions, in their application at the Denver stockyards, are reasonable is a matter that can be determined only on the basis of evidence. The Judicial Officer carefully refrained from expressing an opinion as to whether the regulations are valid or invalid, but decided only that the regulations are not, on their face, invalid (R. 28, 32). The Judicial Officer's decision was, we submit, correct, and we are not expressing in this brief any view as to whether the regulations should be held valid if all of the factual circumstances are presented. But in support of our argument that the reasonableness of the regulations should be determined only on the basis of the market conditions and circumstances, it is appropriate, we believe, to refer in broad outline to some of the circumstances in the livestock industry which, it seems, might be involved in some of the relevant considerations in resolving a factual issue as to reasonableness of the regulations in this case.

The owner of a stockyard is, of course, interested in maintaining the stability and integrity of the market (compare *Kelly* v. *Union Stockyards & Transit Company of Chicago,* 190 F. 2d 860, 861–862 (C. A. 7) with *Cella* v. *United States,* 208 F. 2d 783, 785–788 (C. A. 7), certiorari denied, 347 U. S. 1016), and the interest of the owner in the operations of the stockyard would seem to be broader and somewhat different from the interests of a market agency which has no ownership interest in the stockyard but merely occupies a space—free of rental—in the stockyard and sometimes occupies a space in the office building for which rental is paid (*Tagg Bros.* v. *United*

States, 280 U. S. 420, 437). "In the event, for example, market agencies undertake, in effect, the boycottage of a stockyard, *while they are actively and freely operating on its premises,* by soliciting business for other markets or if they—to the detriment of the stockyard and the patrons of the stockyard—otherwise improperly interfere with the normal flow of livestock to the market, the owner of the stockyard may feel constrained to issue regulations to guard against the practices. It has been said, in the administration of this Act, that one of the responsibilities of the owner of a stockyard is to "[t]ake the leadership in eliminating undesirable trade practices * * *." *Suggestions for Improving Services and Facilities at Public Terminal Stockyards* (United States Department of Agriculture, 1952), pp. 2–3.

The regulations in this case are brief, and apply to market agencies or dealers engaging in business at the posted market in Denver (R. 12, 39). The "area to which this subdivision (c) [*i. e.*, the regulations] shall apply" is carefully circumscribed as the State of Colorado with specified counties or areas therein excepted (R. 12, 39). That delimitation of the "area to which this subdivision (c) shall apply" qualifies and modifies everything in the regulations, and is basic to all of the regulatory provisions. Within the framework of that limited scope of the regulations, the initial provision in the regulations is with respect to the *solicitation* of business for other markets (R. 12, 39). The markets thus referred to are not identified as other stockyards, and there is some indication that the markets are not other stockyards

(R. 64-69). In any event, however, to solicit is to "make petition to; to entreat; importune; * * * now, often, to approach with a request or plea, as in selling * * *." *Webster's New International Dictionary* (2d ed, 1950), p. 2393. The solicitation of business involves entreaty or importunity. *Id.* at 2394. The provisions with respect to the solicitation of business for other markets do not, however, preclude the giving of advice or the carrying on of business activity other than that involving or based on solicitation. Plainly the regulations do not refer or relate to the giving of information or counsel, *i. e.*, advisive activity which is not solicitation. Endeavoring to secure customers to sell or purchase livestock at other markets, as referred to in the regulations (R. 12, 39), is another way of describing the solicitation of business for other markets.

The remaining portion of the regulations relates to the diversion of livestock or an attempt to divert livestock "from this market which would otherwise normally come to this Stockyard" or the interference with "the normal flow of livestock to the public market at this Stockyard" (R. 12, 39). The normal flow of livestock referred to in the regulations is the normal flow of livestock which would come to the posted market in Denver from the defined area, *i. e.*, Colorado with certain counties or areas therein excepted (R. 12, 39).

The regulations impose no restriction on farmers or producers of livestock as to the sale or disposition of their livestock. They are free to dispose of their live-

stock at any market and in any way they choose.[30] The respondent, however, is registered as a market agency at the posted market in Denver, and the respondent, as a market agency, is charged with responsibilities and duties under the Act, the same as a stockyard owner. "The producer consigns his livestock to a market agency to represent him as his agent and who is supposed to have no interest except the welfare of his principal. Accordingly the producer places his financial interests in the absolute control of his agent. Consequently, the success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value. To say that much depends on the integrity and ethics of those engaged in marketing livestock is speaking mildly." *Midwest Farmers* v. *United States*, 64 F. Supp. 91, 95 (3-Judge Court, D. Minn.).

Improper or otherwise unreasonable trade practices—that is to say, practices which are not consonant with "reasonable stockyard services"—in the buying, selling, or marketing of livestock at a terminal stockyard are of direct concern to the stockyard owner as well as to the patrons of the market. There

[30] Not only are the producers of livestock free to market their livestock as they choose, but in addition the regulations at the Denver market provide that "[a]ny owner may handle, offer for sale, and sell livestock upon this Market without the assistance of a market agency, and will be furnished without discrimination reasonable facilities and services." Denver Union Stock Yard Co., Tariff 14, item 3 (c). These regulations are in a public document on file in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture, Washington, D. C.

is the over-riding public interest to be considered, and the factor of direct-marketing is of significance. "It is often said that central markets are basic to price formation. The terminal market prices are certainly of great importance. They represent the values placed on rather large volumes. They are fully reported, and the prices and related information * * * are widely disseminated." *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), p. 50. In other significant respects also the continued stability of the terminal stockyards is believed to be in the public interest. See, Waite and Trelogan, *Agricultural Market Prices* (2d ed., 1951), pp. 135, 139, 145. Reasonable regulations for the stability of the market, in the public interest, may be issued. One of the essentials of a terminal stockyard is that "[i]t must accurately value products, including quality differences." Fowler, *The Marketing of Livestock and Meat* (1957 ed.), p. 219. The accurate estimation of value, for example, "is especially important in fat cattle because different lots vary widely in value. To evaluate such difference, adequate numbers of trained and qualified specialists—both buyers and sellers—are needed. Their services can be utilized most economically if concentrated in a few places." *Marketing, 1954 Yearbook of Agriculture*[31] (U. S. Department of Agriculture), p. 49. "To be a good order-buyer market, a large selection of livestock must be available so that such buyers can

[31] The author of this article in the *1954 Yearbook of Agriculture* is Dr. L. J. Norton, Professor of Agricultural Economics, University of Illinois.

find an adequate number of the weight, grade, and class of animals needed to fill specialized orders." *Ibid.* "The advantage of the terminal public market is the experienced salesmanship and the concentration of livestock buyers there." Shepherd, *Marketing Farm Products* (3d ed. 1954), p. 337. "Salesmen of commission firms and the buyers for packers are expert judges of quality. They have information about the current supply of animals of a given species and quality and about general conditions of supply and demand." *Marketing, 1954 Yearbook of Agriculture* (U. S. Department of Agriculture), p. 42.[32] "Animals are of such varying quality that their relation to a given quotation is difficult to judge. * * * The skill of the local buyer in judging the quality of the animal is fully as important as his knowledge of the central market quotation in determining the profitability of the transaction to him." Waite and Trelogan, *Agricultural Market Prices* (2d ed., 1951), p. 143.

The stability and integrity of the markets are, manifestly, of public interest. Market agencies—as agents, *i. e.*, commission men for the owners of the livestock—and the different types of buyers at the terminal markets are in a competitive relationship, and "[i]t is the conflict between these sellers and buyers—the one seeking to obtain as much as possible for the livestock and the other seeking to pay as little as possible—that sets the market value of livestock.

[32] The author of this article in the *1954 Yearbook of Agriculture* is Dr. Edward A. Duddy, Professor of Marketing (Emeritus), University of Chicago.

The market value thus set is a yardstick which is used throughout this area", *i. e.*, the geographical area served by the particular terminal market. *In re Market Agencies at Sioux City Stockyards,* 9 Agr. Dec. 4, 22–23. It may be expected that regulations will be issued by stockyard owners with respect to various practices in the solicitation of business and in the consummation of the livestock transactions. As we have shown, *supra,* pp. 38–52, the regulations throughout the industry, over a long period of time, evince a wide variety of provisions. The regulations in the case at bar are not, in this respect, unique. See, *e. g.,* 9 C. F. R. 1956 Supp., § 201.63. In this case and with regard to all similar regulations, broad issues of fact as well as narrow and specific issues of fact are involved in resolving the basic question as to whether, limned against the public interest, the regulations are reasonable in whole or in part.

The regulations relate to trade practices which have not been explained or evaluated. Here, as in *Adams* v. *Mills,* 286 U. S. 397, 409–410, and *Armour & Co.* v. *United States,* 312 U. S. 195, 197, the issues are not pure questions of law, divorced from the facts, but have their setting in the delicate complexities of far-flung business transactions. It is not for the Secretary or for the courts to determine what the terms of the Act may require upon supposable facts, but to adjudge the issues upon existing facts. See, *e. g., Virginian Ry.* v. *United States,* 272 U. S. 658, 665; *Bissell* v. *Spring Valley Township,* 124 U. S. 225, 232. The Act commands a "full hearing" and that has "obvious reference to the tradition of judicial pro-

ceedings in which evidence is received and weighed by the trier of the facts." *Morgan* v. *United States*, 298 U. S. 468, 480. See, also, *United States* v. *Morgan*, 313 U. S. 409, 415, 417.

The evidence has not been received, and in the absence of the evidence it cannot be said that the regulations are unreasonable or discriminatory.

4. On the reversal of the judgment of the Court of Appeals and the affirmance of the decision of the Judicial Officer, the administrative agency will be free to take whatever action is appropriate with respect to the contested regulations

The Secretary of Agriculture will be free, on the reversal of the judgment of the Court of Appeals and the affirmance of the decision of the Judicial Officer, to institute an investigation or proceeding, if such is deemed to be appropriate, with respect to whether the regulations are, in view of the facts, unjust or unreasonable. 7 U. S. C. 1952 ed. §§ 210 (c) and 211. The Secretary may on his own motion institute an investigation or a hearing as to the validity of the regulations. 7 U. S. C. 1952 ed § 210 (c). The "Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by a petition * * *." *Ibid.* Investigatory subpoenas may be issued by the Secretary in this administration of the Act (7 U. S. C. 1952 ed. § 222, incorporating 15 U. S. C. 1952 ed. §§ 46 and 48–50), and an investigatory subpoena *duces tecum* issued by the Secretary, in an investigation on his own motion, is judicially en-

forceable under the Packers and Stockyards Act (*Woerth* v. *United States,* 231 F. 2d 822, 823–825 (C. A. 8)).

In this proceeding in the administrative agency, the respondent in this Court was the complainant and the Stock Yard Company was the defendant (*Cf. Henderson* v. *United States,* 339 U. S. 816, 818–823; *United States* v. *Interstate Commerce Com.,* 337 U. S. 426, 428–429, 432–444), but the decision by the Judicial Officer did not pass on whether the regulations are valid, and held only that the regulations are not, as a matter of law, illegal on their face (R. 16, 32). The decision by the Judicial Officer is, on the record before him, *non constat* that the regulations are unreasonable. Hence, there has been no administrative decision which would preclude the Secretary from taking further action—by way of investigation or hearing—on his own motion, or on further complaint by a market agency or dealer, with respect to the validity of the regulations in view of the market circumstances. The Secretary has full authority—on reversal of the judgment of the Court of Appeals and the affirmance of the decision of the Judicial Officer, dismissing the complaint—to institute further action if in his discretion it is appropriate, and the administrative duty will be properly discharged.

II. THE BASIC STATUTORY DETERMINANTS WITH RESPECT TO THE VALIDITY OF THE REGULATIONS AT ISSUE ON THIS APPEAL ARE SET FORTH IN THE PACKERS AND STOCKYARDS ACT

This proceeding was instituted under the Packers and Stockyards Act to determine the validity of regu-

lations issued by a stockyard owner pursuant to the Act. The decision by the Court of Appeals relates only to the terms in the Act (R. 77–84). The integrated and inclusive character of the statutory provisions in the Packers and Stockyards Act are manifest from the text and the legislative background. The Act "is a very broad and comprehensive law. * * * [T]hose in charge of the legislation were impressed with its comprehensiveness. In the report of the House Committee on Agriculture [H. Rept. No. 77, 67th Cong., 1st sess., p. 2], it is stated that this law, 'and existing laws, give the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith; * * * it is a most comprehensive measure and extends farther than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act.'" *United States* v. *Donahue Bros.*, 59 F. 2d 1019, 1022 (C. A. 8).

The Packers and Stockyards Act was "worked out with great care and painstaking, with a view of providing a constructive measure that would properly safeguard the interest of the public and all elements of the industry from the producer to the consumer without destroying any unit of it." H. Rept. No. 77, 67th Cong., 1st sess., p. 2. "The procedure and language [of the Packers and Stockyards Act] are modeled very closely on the interstate commerce act, and the Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over rail-

roads, including the power, after full hearing, to establish and enforce just and reasonable rates and charges for, and practices in connection with, the furnishing of stockyard services." *Id.* at p. 10. The Secretary "is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads * * *." *Tagg Bros.* v. *United States*, 280 U. S. 420, 435, fn. 3. It cannot be gainsaid that the congressional purpose with respect to the stockyard industry, and specifically with respect to the furnishing of reasonable stockyard services by stockyard owners, is set forth fully in the Packers and Stockyards Act. 7 U. S. C. 1952 ed. § 201 *et seq.*

The respondent has referred to the Anti-trust Acts in support of its argument that the regulations are violative of the Packers and Stockyards Act (R. 5, 28), but there is no merit, in view of the record, to the respondent's reference or reliance on those statutory measures. The "problem of accommodation" with respect to a specific regulatory statute and the antitrust laws was resolved in *McLean Trucking Co.* v. *United States*, 321 U. S. 67, and the Court noted that the Transportation Act "is the later in time and constitutes not only a more recent but a more specific expression of policy" (321 U. S. at 79). The Court held that the Interstate Commerce Commission "has no power to enforce the Sherman Act as such" (*id.* at 79), but that if the Commission is "faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view," the Commission

"cannot, without more, ignore the latter" (*id.* at 80). Specifically, the Court held that in authorizing the particular consolidation at issue in the case, the Congress "did not import the general policies of the antitrust laws as a measure of their permissibility" presumably because the Congress "took into account the fact that the business affected is subject to strict regulation and supervision, particularly with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed" (*id.* at 85).

"That there is a national policy favoring competition cannot be maintained today without careful qualification." *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U. S. 86, 91. "It is only in a blunt, undiscriminating sense that we speak of competition as an ultimate good. Certainly, even in those areas of economic activity where the play of private forces has been subjected only to the negative prohibitions of the Sherman Law, this Court has not held that competition is an absolute" (*id.* at 92). The Court, in the *RCA* case, *supra,* reversed the order of the Federal Communications Commission—which authorized the Mackay Radio and Telegraph Company to establish additional radiotelegraph facilities—because the Commission had applied what it believed to be the national antitrust policy instead of the policy set forth in the Federal Communications Act. 346 U. S. at 90–98. In rejecting the argument of RCA Communications, Inc., that the decision of the Commission was also erroneous because "the grant of authorization to Mackay would violate § 314 of the

Communications Act, which forbids common ownership, control or operation of radio and cable in international communication whose purpose or effect may be substantially to lessen competition, restrain commerce or unlawfully to create a monopoly" (*id.* at 97), the Court held that "arguments based on comparable language in the Clayton Act and on decisions under that Act and under the Sherman Law cannot, we think, be sustained. What may substantially lessen competition in those areas where competition is the main reliance for regulation of the market cannot be automatically transplanted to areas in which active regulation is entrusted to an administrative agency; for reasons we have indicated above, what competition is and should be in such areas must be read in the light of the special considerations that have influenced Congress to make specific provision for the particular industry" (*id.* at 98). See, also, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 223–224.

The "antitrust laws can have only limited application to industries regulated by specific statutes. Those laws, though quite properly viewed as having been intended 'to make of ours * * * a competitive business economy,' are not constitutional mandates * * *. We think it obvious that they may not be extended beyond that part of the economy which Congress intended to leave to the operation of the free market. 'Certainly what Congress has forbidden by the Sherman Act it can modify.'" *Pennsylvania Water & Power Co.* v. *Federal Power Com'n.*, 193 F. 2d 230, 234 (C. A. D. C.), affirmed, 343 U. S. 414. Where a "statute provides for comprehensive and detailed reg-

ulation of a particular industry * * * there is, as we have indicated, only a limited area for application of antitrust considerations to Commission decisions" (193 F. 2d at 235).

In view of the comprehensive expression of the congressional purpose as to the stockyard industry set forth in the Packers and Stockyards Act including, specifically, regulation "with respect to rates charged the public—an effective safeguard against the evils attending monopoly, at which the Sherman Act is directed" (*McLean Trucking Co.* v. *United States, supra,* 321 U. S. 67, 85), the regulations at issue in this case must be tested by the standards of the Packers and Stockyards Act, and here, as in *Federal Communications Commission* v. *RCA Communications, Inc., supra,* 346 U. S. 86, 98, the statutory standards in the Packers and Stockyards Act should be construed "in the light of the special considerations that have influenced Congress to make specific provision for the particular industry."

It was made plain by the Judicial Officer that he was "not by this decision saying that Item 10 (e) of respondent's regulations is valid under the Federal antitrust laws" (R. 32). Specifically, the Judicial Officer stated that the record is lacking "in such information as the quantity, type, and nature of the livestock business conducted in the prescribed area, the competing elements of the livestock industry in such area, the possible effect of respondent's regulation upon the competitive marketing organizations in the area in question, the general flow of livestock originating in the defined area, and other relevant matter. We can-

not find on the basis of the facts before us that Item 10 (c) forecloses competitors from any substantial market; that the volume of business affected by the contested regulations is significant or substantial; and that the regulation necessarily tends to the accomplishment of monopoly" (R. 30–31).

The Judicial Officer also stated that the "evidence in this proceeding is not sufficient to enable us to determine the status of the complainant and respondent in the proscribed area, that is, the extent of competition, the degree of monopoly power of respondent, if any, at Denver or in the proscribed area or whether monopoly power, if possessed, has been used to foreclose competition, to gain a competitive advantage or to destroy a competitor" (R. 31–32). "The problems posed by the alleged monopoly and restraint of trade in this proceeding are unique and before Item 10 (c) can be properly related to the antitrust laws it is necessary that there be a great deal more in the way of a record than we have here" (R. 32). The Judicial Officer concluded that we "are not by this decision saying that Item 10 (c) of respondent's regulations is valid under the Federal antitrust laws. We merely hold that the record is insufficient for a determination that Item 10 (c) violates such laws" (R. 32).

A decision with respect to whether the Judicial Officer correctly decided that the regulations are not invalid on their face is facilitated, we believe, if the significant limitations, with respect to the scope of the regulations, on their face, are sharply chiseled and if the significant facts as to the effect of the regulations

on the marketing of livestock—or, more accurately, the absence of facts—are briefly outlined.

a. The regulations do not, on their face, relate in any way to the fixing of prices. The rates charged by the market agencies and stockyard owners are regulated by the Secretary of Agriculture. 7 U. S. C. 1952 ed. §§ 206, 207, 209–212.

b. The regulations do not, on their face, indicate any agreement by any stockyard owners as to a division of territories. Every stockyard owner is free to advertise for business in the area designated in the Denver regulations and the market agencies operating at other stockyards are free to solicit, actively, business in the area.

c. The regulations do not, on their face, preclude a farmer from sending his livestock to any stockyard or to any purchaser or person of his choice. The farmers are free to select any market for the sale of their livestock.

d. There is no evidence that the Denver stockyard has any monopoly power to compel the movement of any livestock to the Denver stockyard.

e. The regulations do not, on their face, afford a basis for presuming that any competitor will be foreclosed from any substantial market.

(i) There is no evidence in the record of any "competitor" of the Denver stockyards. One of the "particularly significant" trends in the marketing of livestock is that terminal markets "are, with few exceptions, becoming local markets, drawing most of their salable receipts from immediately adjacent trade territory."

Suggestions for Improving Services and Facilities at Public Terminal Stockyards, (Agriculture Handbook No. 36, Livestock Branch, Production and Marketing Administration, U. S. Department of Agriculture, 1952), p. 4. Hence the existence of competing stockyards which draw livestock from the area prescribed in the regulations should not be presumed.

(ii) The regulations do not "foreclose" any possible competing stockyards. The regulations apply only to persons operating at the Denver stockyards. The other stockyard owners are free to advertise in the territory specified in the Denver regulations and the market agencies operating at other stockyards are free to solicit business in the specified territory.

(iii) There is no evidence that prior to the promulgation of the regulations there was a substantial flow of livestock from the area specified in the Denver regulations to other stockyards or that the regulations have changed the flow of livestock in any manner.[33]

f. The respondent in this Court is a market agency, *i. e.*, the respondent is engaged in the business of buying or selling livestock on commission at the Denver Union stockyard (7 U. S. C. 1952 ed.

[33] It may be assumed, on the basis of the affidavits filed in support of the motion by the Denver Union Stock Yard Company for a subpoena *duces tecum* (R. 51–54, 64–70), that the complainant in the administrative proceeding a market agency, was diverting some livestock from the Denver stockyard. But there is no basis for an assumption that the diversion was to a competing stockyard, if any *i. e.*, the diversion may have consisted entirely of transactions from the farm to a packer or other purchaser. Under the regulations, the farmers are free to deal directly with a packer or other purchaser.

§ 201 (c) (1)). The stockyard owner furnishes the market place at which the respondent operates and provides *free* facilities to the market agencies and dealers engaging in business at the stockyard, *supra*, pp. 66–67. The stockyard does not exist for the benefit of the market agencies. Rather the market agencies are part of the working staff at the stockyard to facilitate the flow of livestock from the farms to the purchasers. See *Stafford* v. *Wallace*, 258 U. S. 495, 497–499; *Midwest Farmers* v. *United States*, 64 F. Supp. 91, 95 (D. Minn.). The impact of the regulations, as to the market agencies, is on an integral part of the working force at the stockyard, and the regulations require, in certain respects, that the market agencies refrain from diverting from the Denver stockyards the normal flow of livestock to this market. See *Federal Trade Comm.* v. *Curtis Co.*, 260 U. S. 568, 581–582; *Lawlor* v. *National Screen Service Corporation*, 238 F. 2d 59, 65 (C. A. 3), judgment vacated, 352 U. S. 992.

g. There is no evidence in the record as to how the regulations have been interpreted or applied or what effect they have had, if any.

The decision of the Judicial Officer that the validity of the regulations could be determined only after a careful analysis of the relevant facts is consistent with numerous decisions. For example, in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238, involving the validity of a rule established by the Chicago Board of Trade prohibiting its members from purchasing or offering to purchase during a certain period of each day any wheat, corn, oats, or rye "to arrive" at a price other than the closing bid at the

"Call," *i. e.*, the session of the Board at which sales "to arrive" are made, the Government's case "was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law." But the Court held that "the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Ibid.*

Similarly, the decisions with respect to trade associations and other similar industry enterprises demonstrate that the particular facts in each case determine the legality of activities which may operate to restrain trade. In *Sugar Institute* v. *United States*, 297 U. S. 553, 597–598, the Court held that "[q]uestions of reasonableness are necessarily questions of relation and degree" and that "each case demands a close scrutiny

of its own facts" (297 U. S. at 600).[34] Based upon a transcript of over 10,000 pages of testimony and more than 900 exhibits consisting of many thousands of pages (297 U. S. at 571, fn. 1), the Court held that certain activities of the Sugar Institute cut off opportunities for variation, in the course of competition, as to price and, therefore, were invalid under the Sherman Act.

There is no factual basis in the record on which to invalidate the regulations as a matter of law. The various circumstances and cases were carefully considered in the decision of the Judicial Officer (R. 28–32), and there is no foundation in the record for a holding that the regulations are illegal as a matter of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment the Court of Appeals should be reversed and the decision of the Judicial Officer, dismissing the complaint, should be affirmed.

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[34] See, also, *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 360–361, 378.

APPENDIX

The following are the relevant provisions of the Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U. S. C. 1952 ed. § 181 *et seq.*):

SEC. 2. (*a*) When used in this chapter—

* * * * *

(4) The term "livestock" means cattle, sheep, swine, horses, mules, or goats—whether live or dead; (7 U. S. C. 1952 ed. § 182 (4))

* * * * *

STOCKYARDS AND STOCKYARD DEALERS

SEC. 301. When used in this chapter—

(*a*) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(*b*) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;

(*c*) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(*d*) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser. (7 U. S. C. 1952 ed. § 201.)

SEC. 302. (*a*) When used in sections 201–

203 and 205–217a of this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Said sections shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than twenty thousand square feet.

(*b*) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the definition contained in subsection (*a*) of this section, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of sections 201–203 and 205–217a of this title until like notice is given by the Secretary that such stockyard no longer comes within the definition contained in subsection (*a*) of this section. (7 U. S. C. 1952 ed. § 202.)

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 202 of this title by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section

shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States. (7 U. S. C. 1952 ed. § 203.)

SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this chapter; and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this chapter he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 216 of this title. (7 U. S. C. 1952 ed. § 205.)

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful. (7 U. S. C. 1952 ed. § 206.)

SEC. 306. (*a*) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 202 of this title, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing

all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(*b*) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(*c*) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by general order applicable to special or peculiar circumstances or conditions.

(*d*) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(*e*) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without com-

plaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(*f*) After the expiration of the sixty days referred to in subsection (*a*) of this section, no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall

not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(*g*) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(*h*) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both. (7 U. S. C. 1952 ed. § 207.)

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. (7 U. S. C. 1952 ed. § 208.)

* * * * *

SEC. 309. (*a*) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 205–207 or 208 of this title, or of an order of the Secretary made under sections 201–203 and 205–217a of this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition

which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(*b*) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory, having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subsection (*a*) of this section.

(*c*) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of sections 201–203 and 205–217a of this title, or concerning which any question may arise under any of the provisions of such sections, or relating to the enforcement of any of the provisions of such sections. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(*d*) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(*e*) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(*f*) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. (7 U. S. C. 1952 ed. § 210.)

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 210 of this title, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in

connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(*a*) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(*b*) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed. (7 U. S. C. 1952 ed. § 211.)

SEC. 311. Whenever in any investigation under the provisions of sections 201–203 and 205–217a of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or prac-

tice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (7 U. S. C. 1952 ed. § 212.)

* * * * *

SEC. 316. For the purposes of sections 201–203 and 205–217a of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of said sections, and to any person subject to the provisions of said sections. (7 U. S. C. 1952 ed. § 217.)

SEC. 317. (*a*) The Secretary may, upon written application made to him, and if he deems it necessary, authorize the charging and collection, at any stockyard subject to the provisions of this chapter, by any department or agency of any State in which branding or marking or both branding and marking livestock as a means of establishing ownership prevails by custom or statute, or by a duly organized livestock association of any such State, of a reasonable and nondiscriminatory fee for the inspection of brands, marks, and other identifying characteristics of livestock originating in or shipped from such State, for the purpose of determining the ownership of such livestock. No charge shall be made under any such authorization until the authorized department, agency, or association has registered as a market agency. No more than one such authorization shall be issued with respect to such inspection of live-

stock originating in or shipped from any one State. If more than one such application is filed with respect to such inspection of livestock originating in or shipped from any one State, the Secretary shall issue such authorization to the applicant deemed by him best qualified to perform the proposed service, on the basis of (1) experience, (2) financial responsibility, (3) extent and efficiency of organization, (4) possession of necessary records, and (5) any other factor relating to the ability of the applicant to perform the proposed service. The Secretary may receive and consider the recommendations of the commissioner, secretary, or director of agriculture, or other appropriate officer or agency of a State as to the qualifications of any applicant in such State. The decision of the Secretary as to the applicant best qualified shall be final.

(*b*) The provisions of sections 201–203 and 205–217a of this title relating to the filing, publication, approval, modification, and suspension of any rate or charge for any stockyard service shall apply with respect to charges authorized to be made under this section.

(*c*) Charges authorized to be made under this section shall be collected by the market agency or other person receiving and disbursing the funds received from the sale of livestock with respect to the inspection of which such charge is made, and paid by it to the department, agency, or association performing such service.

(*d*) The Secretary may, if he deems it to be in the public interest, suspend, and after hearing, revoke any authorization and registration issued under the provisions of this section or any similar authorization and registration issued under any other provision of law. The order of the Secretary suspending or revoking any such authorization and registration shall not be subject to review. (7 U. S. C. 1952 ed. § 217a.)

GENERAL PROVISIONS

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SEC. 402. For the efficient execution of the provisions of this chapter, and in order to provide information for the use of Congress, the provisions (including penalties) of sections 46 and 48–50 of Title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this chapter and to any person subject to the provisions of this chapter, whether or not a corporation. The Secretary, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this chapter in any part of the United States. (7 U. S. C. 1952 ed., § 222.)

* * * * *

SEC. 407. The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency, or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the administration of this chapter in the District of Columbia and elsewhere, and as may be appropriated for by Congress, and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose. (7 U. S. C. 1952 ed. § 228.)

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